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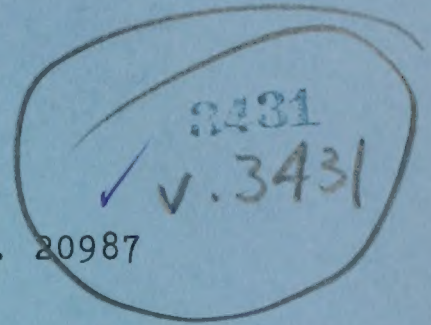


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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW McGARRITY,)
)
Petitioner-Appellant,)
)
vs.)
)
LAWRENCE E. WILSON, Warden,)
)
California State Prison,)
)
San Quentin, California, and)
)
THE PEOPLE OF THE STATE OF)
)
CALIFORNIA,)
)
Respondent-Appellee.)
)

No. 20987



APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

JAY S. LINDERMAN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1526

Attorneys for Respondent-Appellee

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WM. B. LUCK, CLERK

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Respondent-Appellee.)	
<hr/>		

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On February 25, 1959, appellant, Andrew McGarrity, was convicted in the Superior Court of Los Angeles County

(Long Beach Branch), California, of the felony of first degree murder in violation of section 187 of the California Penal Code. He was sentenced on that same date to imprisonment in the State Prison for the term of his natural life.

Appellant did not appeal the above conviction. Rather, nearly seven years later, he filed a petition for a writ of habeas corpus in the Superior Court of Marin County, California. That petition (No. 44422) was denied without hearing on December 2, 1965. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court (No. CR. 9678) which also was denied without hearing on January 26, 1966. The same factual and legal issues presented to the District Court below were raised in those petitions.

B. Proceedings in the Federal Courts

On March 9, 1966, the United States District Court for the Northern District of California, Southern Division (Burke, J.) denied appellant's motion to file in forma pauperis a petition for writ of habeas corpus (CT 1, 54). On April 5, 1966 an order was issued by District Judge Burke granting appellant's application for certificate of probable cause and allowing him to appeal in forma pauperis (CT 46, 54). A notice of appeal was filed by appellant on April 19, 1966 (CT 47, 54).

SUMMARY OF APPELLEE'S ARGUMENT

1. The District Court was not required to hold an evidentiary hearing.

A. The rule of Escobedo v. Illinois, 378 U.S. 478 (1964) may not be applied retroactively, as would be required, to affect appellant's conviction.

B. Appellant's allegations as to ineffective assistance of counsel and denial of his right of confrontation of witnesses are without substance.

ARGUMENT

THE DISTRICT COURT WAS NOT REQUIRED
TO HOLD AN EVIDENTIARY HEARING.

The sole issue confronting this Court is whether the District Court, when presented with the allegations in appellant's habeas corpus petition, erred in not ordering an evidentiary hearing. We submit that the court below acted properly. Neither Townsend v. Sain, 372 U.S. 293 (1963) nor its predecessor, Brown v. Allen, 344 U.S. 443 (1963), require a district court to hold a hearing on every habeas corpus application, but only when the basic historical facts are in issue.

In the instant case the issues presented to the District Court were not of disputed facts. From the petition itself, it was clear as a matter of law that appellant was,

and is, not entitled to relief. In such a situation, the need for a district court hearing is obviated. Chavez v. Dickson, 280 F.2d 727, 734-35 & n. 15 (9th Cir. 1960). And see Townsend v. Sain, supra, 372 U.S. at 312; Brown v. Allen, supra, 344 U.S. at 463-65, 506-07; United States v. Pate, 345 F.2d 691, 696 (7th Cir. 1965); Kerrigan v. Scafati, 348 F.2d 187, 188-89 (1st Cir. 1965).

A. The rule of Escobedo v. Illinois, 378 U.S. 478 (1964) may not be applied retroactively, as would be required, to affect appellant's conviction.

Petitioner urges here, as he did below, that his conviction should be upset because an allegedly false tape recorded confession was obtained from him in the absence of counsel and because he was forced to sign a transcription of this confession without the advice of counsel. Petitioner makes this argument in reliance upon Escobedo v. Illinois, 378 U.S. 478 (1964). The District Court ruled that appellant was precluded from raising this issue since Escobedo could not be applied retroactively to affect appellant's conviction which had become final long before that decision (CT 1). The correctness of that ruling is now beyond question since the United States Supreme Court has stated definitely that its decision in Escobedo is to have purely prospective effect. Johnson v. New Jersey, 34 U.S.L. Week 4592 (U.S. June 20, 1966).

B. Appellant's allegations as to ineffective assistance of counsel and denial of his right of confrontation of witnesses are without substance.

Appellant makes the bold assertions that he was denied effective aid of counsel and denied his right of confrontation of witnesses against him. He states little more than these conclusions and the District Court therefore properly concluded that the allegations were "without substance" (CT 1) and therefore of no significance.

Considering the latter allegation first, appellant states that his landlady testified against him once in his presence but that on another occasion she testified against him while he was locked in another room (CT 22). He does not state the materiality, nature or prejudicial effect of her testimony. But more significantly, he does not even state at what proceeding he allegedly was prevented from being confronted by her. Appellant's case was submitted to the state trial court for decision on the basis of the transcript of the preliminary examination. [Such submission on the transcript was clearly proper. Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965), cert. denied, 379 U.S. 983 (1965).] That being the fact, we are bewildered, as presumably was the District Court, how there could have been two proceedings at which the landlady could have testified against appellant.

The District Court could, and did, properly disregard mere "conclusionary allegations" which were "neither warranted nor supported by alleged facts." Schlette v. California, 284 F.2d 827, 833 (9th Cir. 1960). "A petition for a writ of habeas corpus is entitled to consideration, but it must in itself present sufficient facts which give it weight in order to entitle it to the issuance of a writ." United States v. Maroney, 235 F.Supp. 135, 137 (D.C.W.D. Pa. 1964). The Court properly concluded that the allegation was insufficient.

Similarly appellant's allegations as to incompetency of counsel (CT 23) are unsupported and, in the words of the District Court, "without substance" (CT 1). Certainly appellant's counsel was not incompetent, as alleged by appellant, for failing to raise an Escobedo objection to the admissibility of evidence in appellant's case in 1959. Presumably his counsel was not clairvoyant to the point of anticipating, by five years, the rule to be announced in Escobedo, and the Sixth Amendment did not, and does not, require such of counsel. Similarly the District Court was not required to second guess appellant's trial counsel for the alleged failure to object to the alleged repetition of the landlady's testimony, since such second guessing would have depended upon guessing what in fact appellant was alleging. The District Court's actions were proper.

Schlette v. California, supra; United States v. Maroney,
supra.

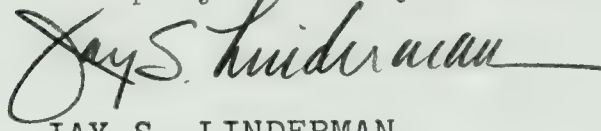
CONCLUSION

For the foregoing reasons, appellee submits that the order of the District Court should be affirmed and the proceedings herein dismissed.

DATED: July 21, 1966

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

A handwritten signature in dark ink, appearing to read "Jay S. Linderman", written over the typed name.

JAY S. LINDERMAN
Deputy Attorney General

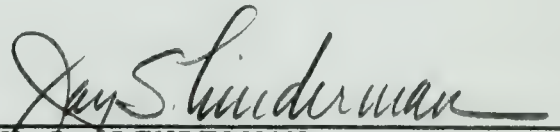
Attorneys for Respondent-Appellee

JSL:cmd
CR SF
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: July 21, 1966



JAY S. LINDERMAN
Deputy Attorney General

In The
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

✓
20989

CHARLES E. SMITH,

Appellant

vs.

STATE OF IDAHO and PAUL W. BRIGHT, Sheriff of
Ada County, Idaho,

Appellees.

Appeal from the District Court of the United States
for the District of Idaho
Southern Division
Honorable Ray McNichols, Judge

FILED

OCT 7 1966

BRIEF OF APPELLEES

WM. B. LUCK, CLERK

ALLAN G. SHEPARD
Attorney General of the
State of Idaho

WAYNE L. KIDWELL
Prosecuting Attorney
Ada County, Idaho

M. ALLYN DINGEL, JR.
Deputy Attorney General
of the State of Idaho

ROBERT C. YOUNGSTROM
Chief Deputy Prosecuting
Attorney, Ada County, Idaho

Attorneys for Appellee,
State of Idaho
Statehouse
Boise, Idaho

Attorneys for Appellee,
Paul W. Bright, Sheriff
Ada County Courthouse
Boise, Idaho

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ALLAN G. SHEPARD
Attorney General of the
State of Idaho

WAYNE L. KIDWELL
Prosecuting Attorney
Ada County, Idaho

M. ALLYN DINGEL, JR.
Deputy Attorney General
of the State of Idaho

ROBERT C. YOUNGSTROM
Chief Deputy Prosecuting
Attorney, Ada County, Idaho

Attorneys for Appellee,
State of Idaho
Statehouse
Boise, Idaho

Attorneys for Appellee,
Paul W. Bright, Sheriff
Ada County Courthouse
Boise, Idaho

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STATEMENT OF CASE

On Appellant's Statement of Case on page 2 of his brief, reference is made to his contention that he was not furnished sufficient time in the state court proceeding to produce certain evidence. This statement is not supported by the record and the record reveals the exact contrary. The transcript of the lower state court proceedings vividly notes that Appellant was granted repeated continuances and was in fact granted continuances to the date sought by his counsel. This Appellees' brief on pages 2 and 3, *infra*, refers directly to this proposition.

It should be further noted that when Appellant speaks on page 4 of his brief that the demanding papers contain the phrase, "information and belief," the criminal complaint of the Missouri prosecutor only contains the phrase in the verification.

ARGUMENT

I

THE STATE TRIAL COURT DID NOT REFUSE APPELLANT AMPLE TIME TO PREPARE FOR HIS HEARING.

Appellant's first issue relates to Federal District Judge Ray McNichols' refusal to allow him to take additional depositions and the refusal to permit Appellant to again re-litigate his cause de novo in a new evidentiary hearing.

His argument on page 8 of his brief is apparently directed towards his belief that he was not granted sufficient time to prepare for his hearing in 1963 before the Ada County Court in the State of Idaho. However, reference to the State Court transcript readily disposes of this contention. Appellant's counsel simply requested a continuance until the following Monday in order to obtain one further item of evidence (Tr. p. 4, L. 7-12), which was granted by the State Court. (Tr. p.7, L. 27-29.) The item was not directed to evidence on the issue of presence in the demanding state, but to the existence of a death certificate. (Tr. p.4, L.17-19.) Furthermore, the state court indicated in unequivocal language that Appellant had been granted a previous continuance and that he should be ready to commence his cause at the date requested by his counsel. (Tr.p.7, L. 11-

29; p. 8, L.2-5.) Appellant's major reliance is on the 1963 Opinion of Townsend v. Sain, 372 U.S. 293, 9 L.Ed2nd 770, 83 S.Ct. 745. The Supreme Court of the United States spoke of six circumstances which demand the Federal Court to grant an evidentiary hearing to a habeas corpus applicant. 372 U.S. at page 313, 9 L.Ed2nd at page 786, 83 S.Ct. at page 757.

Appellant desires to again litigate the issue of his presence in the demanding state at the time of the alleged crime. During the trial in the state court, the court received into evidence two exhibits (Plaintiff's Exhibit No.'s 2 and 4) to substantiate his claim as to nonpresence. Furthermore, Appellant had the deposition of one Harry Lee Dodd read into the record to substantiate his claim. Speaking of such, the Supreme Court of Idaho noted:

" . . . The testimony of Dodd was of a highly questionable nature and the trial court evidently largely discounted the correctness of this testimony (in which conclusion this court concurs, the evidence before that court being wholly documentary in nature). The letter of the sheriff of Muskogee County alone is insufficient to overcome the prima facie case presented, for that does not overcome the allegation and sworn statement that the accused was in Missouri at the time the alleged crime was committed. The findings of the trial court are sustained by the record." Smith v. State, 89 Idaho 70, 77, 403 P.2d 221, 224 (1965)

Dodd is a convicted felon and has been twice adjudicated insane. (Tr. p.22; p.23, L.23.)

II

FEDERAL DISTRICT JUDGE RAY MC NICHOLS CORRECTLY EXERCISED HIS DISCRETION IN REFUSING TO PERMIT APPELLANT TO AGAIN LITIGATE HIS CAUSE DE NOVO.

Appellant certainly cannot suggest Judge McNichols did not have before him a full and complete record of the various prior courts' proceedings. Judge McNichols notes on page 3 of his Opinion that the entire record presented before the United States Supreme Court was made a part of record before his court. This included even all written briefs presented by the parties. The lower court on page 4 of its Opinion even noted that Appellant conceded that a complete and accurate record was before the court. While Townsend v. Sain imposes a mandatory duty on the federal court in certain situations, certainly the federal court still possesses the right to decide in its discretion whether that situation does in fact exist. His opinion recognizes that he perused the record with care and concluded that Appellant had been indeed afforded a full, complete and adequate evidentiary

hearing with the aid of competent counsel.

Another factor of substantial import illustrated by Judge McNichols is that the instant proceeding is not a review of a criminal proceeding against Appellant, but rather only a legal avenue being pursued by a state seeking to have one returned to its jurisdiction for the purpose of affording him a full scope judicial determination of the ultimate issue. At that time, the Appellant will have afforded to him ample opportunity to present any newly discovered evidence. Appellees believe no door of defense which will be available to him in Missouri has been closed or encroached upon by the considered opinion of Judge McNichols.

III

APPELLANT COMPLETELY FAILED TO OVERCOME THE PRIMA FACIE CASE IN MEETING HIS BURDEN UNDER THE TEST PRESCRIBED BY THE SUPREME COURT OF THE UNITED STATES.

Another matter should be brought to the attention of this Court. Speaking of the provisions of 62 Stat. 822, 18 U.S.C. §3182, the Supreme Court of Idaho in Smith v. State stated:

"'The rendition warrant must show on its face that the requirements of the law have been fulfilled; namely (1) that the accused has been demanded as a fugitive from justice

by the executive of the state from which he fled; (2) that he stands charged with the commission of a crime in that state; (3) that a copy of an indictment, or affidavit made before a magistrate, containing the charge, is presented with the requisition, duly certified as authentic. Annotation 89 A.L.R. 595. Such recitals are presumed to be true, and a warrant valid on its face is prima facie sufficient authority for the officer to arrest and deliver the accused.'" 89 Idaho at page 75, 403 P.2d at page 223; quoting from In re Martz, 83 Idaho 72, 75, 76, 357 P.2d 940, 972 (1960).

The governor's rendition warrant is prima facie evidence that the Appellant is a fugitive from justice, and the burden of overcoming this prima facie case is on the Appellant. In re Martz, 83 Idaho 72, 75, 76, 357 P.2d 940, 942 (1960), and cases cited therein; 25 Am. Jur., Habeas Corpus, §72. The magnitude of the burden carried by the petitioner in an extradition proceeding was stated by the Supreme Court of the United States in South Carolina v. Bailey, 289 U.S. 412, 421, 422, 77 L.Ed 1292, 1297, 53 S. Ct. 667, 671 (1933):

"Considering the Constitution and statute and the declarations of this Court, we may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of the homicide. Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed, and, consequently, could not be a fugitive from her

justice." (Emphasis added.)

The Supreme Court of Illinois in the case of People ex rel. Guidotti v. Bell, 372 Ill. 572, 577, 25 N.E.2d 45, 58, 49 (1940) stated:

" . . . [T]he most that could be said of the alibi evidence that was offered would be that it might raise a doubt, but it fell far short of the clear and convincing proof required by the decisions of the United States Supreme Court."

In Munsey v. Clough, 196 U.S. 364, 25 S.Ct. 282, 4 L.Ed. 515(1905), the Court had commented on a conflict in evidence bearing on the question of the presence of the petitioner within the demanding state at the time of the commission of the crime:

"But the court will not discharge a defendant arrested under the Governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

It is Appellees' position that Appellant completely failed in overcoming the prima facie case in meeting his burden under the test prescribed by the Supreme Court of the United States.

IV

AFFIDAVITS ARE ADMISSIBLE ON THE QUESTION OF IDENTITY AND PRESENCE.

The next question to be considered deals with the admissibility of the Affidavits to prove the identity of the Appel-

lant and his presence in the demanding state (Missouri) at the time of the commission of the alleged crime. In rejecting this argument, Mr. Justice McFadden speaking for an undivided court in Smith v. State, 89 Idaho 70, 76, 403 P.2d 221, 224(1965) said:

" . . . In extradition cases an exception is generally made to the rule that affidavits are considered hearsay evidence and hence inadmissible. I Wigmore, Evidence §24 (3rd ed. 1940); Munsey v. Clough, 196 U.S. 364, 24 S.Ct. 282, 49 L.Ed. 515(1905); People ex rel. Chevlin v. O'Brien, 372 Ill. 640, 25 N.E.2d 4 (1939); United States ex rel. Austin v. Williams, 5 Cir., 12 F.2d 66; Annot., 93 A.L.R.2d 912, at 931, and cases cited therein. In People ex rel. Chevlin v. O'Brien, supra, the Supreme Court of Illinois stated:

"* * * It was proper to admit in evidence on the habeas corpus hearing all the papers, including the affidavits, which were before the Governor when he issued the warrant. (Citation omitted). The purpose of the admission is to establish upon what the Governor of Illinois found a prima facie case against relator."

The affidavits were properly received and considered by the trial court."

In Munsey v. Clough, 196 U.S. 364, 25 S.Ct. 282, 4 L. Ed. 515 (1905) the Supreme Court of the United States quoted from and relied upon an ex parte affidavit in arriving at its decision. The decision has repeatedly been cited for this proposition. See also United States ex rel. Austin v. Williams, 6 F.2d 13 (E.D. La. 1925), affirmed 12 F.2d 66 (5th Cir. 1926).

Guidotti v. Bell, 372 Ill. 572, 576-77, 25 N.E.2d 45, 48-49

(1939) stated:

"In this proceeding the judicial department of the government is not trying a lawsuit nor determining the guilt or innocence of a defendant. . . It is not for the judicial branch of government to interfere with a considered order of the executive, unless that order be so palpably and conclusively shown to be wrong as to warrant an inference of fraud or inadvertance.

". . . The most that could be said of the alibi evidence that was offered would be that it might raise a doubt, but it fell far short of that clear and convincing proof required by the decisions of the United States Supreme Court. The appellant sat in the courtroom, but failed to take advantage of his opportunity to testify in his own behalf, and, since this is a civil suit, his silence could not but be considered by the trial court. . . He chose not to rely upon candor or strength of his own position and, in so doing, made a case under which he is not susceptible to discharge by the rules laid down by the Supreme Court of the United States. "

In that case, the petitioner claimed he was not in the demanding state at the time charged in the complaint and was not the person named. A photograph attached to an affidavit which identified the photograph as that of the person charged was admitted into evidence. The petitioner presented five witnesses who testified in his behalf to the effect that he was not present in the state. It is clear that the appellant in the case now before this court did not present sufficient

proof of discharge under the holding in the Guidotti case.

No case has been found or cited in which a state or Federal court stated that ex parte affidavits are not admissible in habeas corpus proceedings on the issue of identity or presence in the demanding state. Letwick v. State, 211 Ark. 1, 198 S.W.2d 830 (1947) and Notter v. Beasley, 240 Ind. 631, 166 N.E.2d 643 (1960) do stand for the proposition that hearsay evidence on the question of identity is admissible, in form other than that of affidavits. This is the only question on which there is any division of authority whatever.

In the Letwick and Notter cases, the agent of the demanding state stated that a photograph of the petitioner had been identified by persons in the demanding state as the person who committed the crime. The Supreme Court of Indiana defended its position in Notter v. Beasley, 240 Ind. 631, 639, 166 N.E.2d 643, 647 (1960), as follows:

" . . . We concede this is hearsay testimony. . . but the appellant is not on trial for the commission of the offense in this State. In fact, the issue of his guilt or innocence is not in question here and the constitutional provision that he is entitled to be confronted with witnesses against him for cross examination is not applicable here. If and when appellant is tried for the crime charged in the State of Oklahoma, he will be entitled to be confronted by the witnesses there who seek to identify him. It is there that his identity

must be proved beyond a reasonable doubt-- not here. We are sustained in the position we take here by an almost unanimous weight of authority."

Letwick v. State, 211 Ark. 1, 198 S.W.2d 830 (1947)

involved a similar state of facts and the Arkansas court accepted the hearsay testimony concerning the identification of the petitioner by others.

The Letwick case had been tried in Texas prior to the Arkansas decision. The Texas court held that the testimony of the agent of the demanding state as to what he had been told by others was not sufficient on the question of identity. Letwick v. State, 145 Tex. Crim.App. 416, 168 S.W.2d 866 (1943). A similar holding by the Texas court is found in the case of Ex Parte Williams, 169 Tex.Crim.App. 192, 333 S.W.2d 146 (1960.) However, the courts of Texas have uniformly held that affidavits from persons in the demanding state on the question of identity and presence in the state were admissible in extradition proceedings. Ex Parte O'Conner, 169 Tex.Crim.App. 559, 336 S.W.2d 152 (1960) and Ex Parte Green, 170 Tex.Crim.App. 311, 340 S.W.2d 821 (1960.)

The courts which have considered this question are unanimous that ex parte affidavits are admissible in extradition proceedings. Annotation, 93 A.L.R.2d 912, at page 931 and cases cited therein.

Dean Wigmore, in his monumental work on evidence, states that there are certain proceedings wherein the common law rules of evidence are not applicable. He mentions ex parte proceedings, interlocutory proceedings, grand jury proceedings, disbarment proceedings and proceedings for fixing sentence. He also includes extradition as one of these special proceedings:

"For the same reasons of principle, extradition proceedings are not governed in strictness by the jury-trial rules of Evidence. Moreover, here the additional reason obtains that the evidence is brought from outside the jurisdiction, and the procurement of evidence is thus likely to be hampered by the lack of power or practicability, as well as by the possible differences of law in another system." 1 Wigmore on Evidence 3rd Ed. §4(6), p. 24.

V

THE RENDITION WARRANT SATISFIES THE REQUIREMENTS OF
62 STAT. 822, 18 U.S.C. § 3182.

Appellant further contends that the rendition warrant of the asylum state (Robert E. Smylie, Governor of the State of Idaho) fails to comply with the requirements of 62 Stat. 822, 18 U.S.C. §3182, when it states the required affidavit was "found in the county" and not that it was "made before a magistrate." The rendition warrant, which is a portion of Exhibit No. 3 of the lower court records, reads in part:

" . . . Charles E. Smith stands charged by the Affidavit found in the County of Adair in said State. . . ."

However, this issue was never presented to the Supreme Court of Idaho by the Appellant, either in his opening brief, filed June 8, 1964, or in his reply brief, filed October 14, 1964. His opening brief, which enumerated the Assignment of Errors and his Points and Authorities, is totally absent of reference to such, as was his written Argument in support thereof. Thus, this Court should not now at this late stage pass on a question never properly presented or adjudicated below.

The affidavit of Vance R. Frick, Prosecuting Attorney within and for the County of Adair, in the State of Missouri is in fact a criminal complaint under oath, and also a part of Exhibit No. 3. The complaint was made before a magistrate of the State of Missouri and was subscribed and sworn to before the same magistrate.

Of further import is an opinion of the Supreme Court of Idaho in 1960. The Governor of Idaho's rendition warrant in In re Martz, 83 Idaho 72, 357 P.2d 940, recited that the individual, "stands charged by the Complaint found in the County of San Diego." Petitioner contended the warrant was invalid because of the recital that he stands charged by "Complaint" instead of "Affidavit" made before a magistrate of the demanding state. The complaint was sworn to by a private citizen before a judge of the Municipal Court of the City of San Diego.

In the instant matter, the affidavit of the prosecutor was in unequivocal, clear, and concise terms, and also sworn to before a magistrate of the demanding state. Rejecting petitioner's argument that the complaint was non-compliance with 62 Stat. 822, 18 U.S.C. §3182, Mr. Chief Justice Taylor, speaking for an undivided court, said:

"Thus, a criminal complaint sworn to before a magistrate is in fact an affidavit within the meaning of the federal statute authorizing extradition upon the production of a copy of 'an affidavit made before a magistrate.' The great weight of authority supports this conclusion." 83 Idaho at page 77, 357 P.2d at page 943. (Emphasis added.)

The Idaho Supreme Court cited on the same page in support of the above holding, a host of judicial authorities, including opinions of the Supreme Court of the United States and other federal courts' opinions, wherein the Supreme Court of the United States has denied certiorari. Thus, these Appellees believe that Appellant's argument is devoid of merit.

VI

THE COMPLAINT CHARGES A CRIME IN DIRECT AND UNEQUIVOCAL LANGUAGE AND ONLY THE VERIFICATION CONTAINS THE PHRASE, "INFORMATION AND BELIEF."

Petitioner contends that the complaints of the Prosecutor, Vance R. Frick and that of one Olin Johnson, both made before a magistrate of the State of Missouri, were insufficient in that they were executed on "information and belief." In his brief, at page 13, Appellant cites the case of Ex Parte Murray, 112 S.C. 342, 99 S.E. 798 (1919), for the proposition

that an extradition affidavit 'to the best of affiant's knowledge, information, and belief,' without stating that facts were within his knowledge or the sources of his information and belief, is defective and a warrant issued thereon is invalid.

The Murray case does stand for this proposition, and cites Rice v. Ames, 180 U.S. 371, 21 S.Ct. 406, 45 L.Ed. 577 (1901), in support of its holding. In Rice v. Ames, the United States Supreme Court held that where a crime was charged in a complaint "on information and belief," that this was insufficient to charge a crime and therefore such a complaint was not a valid basis for extradition. The complaint on which the petitioner was finally extradited contained four charges, one of which charged a crime on information and belief, and the other three of which did not. The Court said that the first charge was insufficient to be grounds for extradition, but that the remaining three were adequate.

However, in the case at bar, the complaint sworn to by the prosecutor in Missouri, Vance R. Frick, charges a crime in direct and unequivocal terms. (Tr. pp 69,70.) It is only the verification of the complaint which states that the facts set forth in the complaint were true "according to the best knowledge, information and belief" of the prosecutor. This was not the situation in Rice v. Ames. This is seen by the

fact that only one of the four charges contained in the complaint were declared to be inadequate by the Supreme Court. If the Court had been considering a verification, it would, of necessity, had to invalidate the whole complaint. The distinction here is between a complaint which charges a crime "on information and belief", as in Rice v. Ames, and a complaint which affirmatively and directly charges a crime, but is verified as being true according to "knowledge and belief" as is the case before this Court.

Any attempt to draw an analogy between the two fact situations is devoid of accuracy. Various cases illustrate the distinct difference. In Ex Parte Davis, 68 Cal.App.2d 798, 158 P.2d 36 (1945), the affidavit concluded that the allegations "are true as I verily believe." A California court had this to say regarding a contention that this was an affidavit made upon "information and belief" and therefore not grounds for extradition:

"... 'In the case before us the charge in the information is made directly and positively that petitioner committed the offense; it is not asserted that it is made upon information and belief.' 68 Cal.App.2d at page 809, 158 P.2d at p. 41.

The case of Ex Parte Brown, 77 Tex. Crim.App. 312, 178 S.W. 366 (1915), is to the same effect. The first paragraph of the complaint charged the crime in positive terms and concluded:

"This complaint further says that he has just and reasonable grounds to believe, and does believe, Joseph L. Brown committed said offense. Wherefore the said Ed. A. Garvey prays a warrant may issue against the said Joseph L. Brown according to law." 77 Tex. Crim.App. at p. 313, 178 S.W. at p. 366.

The Texas Court held on the same pages noted above that the second paragraph of the complaint did not invalidate the positive and direct charge of the crime in the first paragraph:

"... The first paragraph of the affidavit is positive and not on information and belief. The second clause does not so modify the first or the whole affidavit as to show it was made on information and belief."

In the case at bar, it is not a paragraph of the complaint following the charge of the crime that contains a statement that the crime was committed by the defendant "to the best knowledge and belief" of the affiant, but is merely the verification made by the prosecutor. The difference between the situation in this case and that of a true case of a complaint made on information and belief is patently shown in the case of People ex rel. Cornett v. Warden of City Prison of Brooklyn, N.Y., 60 Misc. 525, 112 NYS 492 (Sup. Ct. 1908). There the warrant was issued on an affidavit of a City of New York Detective which, in turn, was predicated upon an information sworn to in the Commonwealth of Pennsylvania, which read in part:

"Before me, the subscriber, . . . personally came Jacob Johnson, County Detective, . . . who upon his solemn oath according to law saith, on information received which he believes true, . . ."
112 N.Y.S at p. 493.

The New York Court said that this was not sufficient to charge Cornett with the crime, and that therefore the Commonwealth of Pennsylvania could not extradite him from the asylum State of New York. The case of Ex Parte Spears, 88 Cal. 640, 26 Pac. 608 (1891), is to the same effect, also illustrating a complaint charging a crime "on information and belief."

The Washington Supreme Court considered a question similar to that presented here, in the case of McClendon v. Callahan, 46 Wash.2d 733, 284 P.2d 323 (1955.) The complaint charged the crime in affirmative terms, but the verification contained the words, "the complaint therein is true, as I verily believe." The Washington Supreme Court quoted at length from State v. Cronin, 20 Wash. 512, 56 Pac. 26 (1899):

"It is contended that this statute requires a positive affirmation that the matter stated in the information is true, and is not satisfied by an oath that it is true as the affiant 'verily believes.' An information is a pleading. It is the formal statement on the part of the state of the facts constituting the offense which the defendant is accused of committing; in other words, it is the plain and concise statement of the facts constituting the cause of action. It bears the same relation to a criminal action that a complaint does to a civil action; and, when verified, its object is not to satisfy the court or jury that the defendant is guilty, nor is it for the purpose of evidence which

is to be weighed and passed upon, but is only to inform the defendant of the precise acts or omissions with which he is accused, the truth of which is to be determined thereafter by direct and positive evidence upon a trial, where the defendant is brought face to face with the witnesses. The verification to the information, then, can have but one purpose, viz., to insure good faith in instituting the proceedings, and to guard against vindictive and groundless prosecutions. No good reason can be assigned why this is not accomplished by an oath reciting that the acts or omissions charged are true as the affiant verily believes, as well as by the oath contended for by the appellant. If the charge is falsely, wilfully and corruptly made, perjury can be predicated upon the one form as well as upon the other * * *'" (Emphasis supplied by the court in 46 Wash.2d at p.739, 284 P.2d at p. 327.)

Therefore, it can be seen that other courts have repudiated the contention that the form of the verification of a criminal complaint becomes decisive in an extradition proceeding. To hold that the form was decisive in the case at bar would be to exalt form above substance, and to place a needless technicality in the paths of states seeking to extradite persons charged with crime who have found asylum in other states.

VII

THE SUFFICIENCY OF A COMPLAINT AS A PLEADING IS NOT OPEN TO INQUIRY IN HABEAS CORPUS PROCEEDINGS TO REVIEW ISSUANCE OF A RENDITION WARRANT.

Appellant in his argument 2(d) raises the proposition that the demanding papers were insufficient because the following 2 elements of the charging papers were missing; the demanding papers do not state whether death occurred within a year and a

day of the acts alleged to Appellant, and the same papers do not allege that it was the death of a human being.

Examination of the briefs of Appellant filed before the Supreme Court of the State of Idaho, noted previously, reveals that Appellant never brought to the attention of that court any contention that the demanding papers did not allege that Donna Jean Smith was a human being, or that death occurred within a year and a day. The first mention found of these contentions is on page two of his Petition for Rehearing, filed subsequent to the entry of the Supreme Court of Idaho's formal opinion of June 11, 1965. Appendix A-2 of Petition for Certiorari.

The Petition of Rehearing was denied July 2, 1965, Charles E. Smith v. State of Idaho, 89 Idaho 70, 403 P.2d 221. Thus, this court should not pass on matters never properly passed or adjudicated below. However, Appellees believe that it is of little value that the demanding papers did not allege that Donna Jean Smith was a human being. Murder is recognized throughout the country as the unlawful killing of a human being; reference to the Idaho and Missouri criminal laws are unnecessary. One cannot "murder" an animal or creature not a member of the human race. Black, Law Dictionary (4th ed. 1951) defines murder as:

"The unlawful killing of a human being by another with malice aforethought, either express or implied."

Appellant cannot seek solace in his brief that the demanding papers did not specify whether death occurred within a year and a day. Appellees believe it is well recognized that when a rendition warrant shows on its face that one stands charged with the commission of a crime in the demanding state. The recital is presumed to be true, and the warrant on its face is prima facie sufficient authority for the officer to arrest and deliver the accused. Smith v. State, 89 Idaho 70, 75, 403 P.2d 221, 223 (1965). Appellant's brief on page 24 quotes the applicable statute of the State of Missouri relating to murder in the first degree. The Supreme Court of Idaho was previously presented with a suggestion that essential elements were omitted from the complaint of the demand state, Missouri. Its comments in refuting such are appropo to the case at bar, and found therein is an extensive list of citations in support thereof:

"The complaint before the trial court charged the commission of murder in the first degree in general terms as defined by the Missouri statute. Whether it complies with the requirements of the Missouri law as to the details required to be set out is not for this court to say. The general rule in extradition matters is that the sufficiency of the affidavit, or indictment as a pleading is not open to inquiry on habeas corpus proceedings to review issuance of a rendition warrant. See: Starks v. Turner, 365 P.2d 564 (Okla.Ct.Cr.App.1961); Ex parte Paulson, 168 Or. 457, 124 P.2d 297(1942); 39 C.J.S. Habeas Corpus §39, p. 554; 25 Am.Jur. 195, Habeas Corpus §69; Annots., 81 A.L.R. 552, at 565, and 40 A.L.R. 2d 1151, at 1159; 4 Anderson, Warton's Criminal Law and Procedure § 1667 (1967)" Smith v. State, 89 Idaho 70, 76, 403 P.2d 221, 224 (1965).

VIII

THE REQUIREMENT OF THE PRESENCE OF AN AGENT WITHIN A DEFINITE TIME OFFERS APPELLANT NO DEFENSE IN THE PRESENT LITIGATION.

Appellant's argument found on pages 15-17 of his brief contains an ingenious theory that he should be discharged from custody because no agent appeared within thirty (30) days from the time of the arrest and thus non-compliance with 62 Stat. 822, 18 U.S.C. §3182. Governor Robert E. Smylie's rendition warrant was issued on the 16th day of April, 1963. However, Appellant petitioned for the issuance of the Writ of Habeas Corpus, shortly thereafter, May 9, 1963. The order for issuance of the writ, the writ itself, and service of the writ were all dated May 9, 1963. (Tr. p.29, 41, 43, 44.) While not only was this new issue never presented by Appellant in his previous litigation, it is fairly obvious that Appellant's own actions have prevented the appearance of any agent and final completion of the extradition proceedings.

CONCLUSION

The Supreme Court of the United States, in 1917, explained in unmistakable language the constitutional rationale of interstate extradition. Mr. Justice Clarke, speaking for the Court in Biddinger v. Commissioner of Police, 245 U.S. 128, 132, 133, 62 L.Ed 193, 198, 38 S.Ct. 41, 42, 43, said:

"The provision of the Federal Constitution quoted, with the change of only two words, first appears in the Articles of Confederation of 1781, where it was used to describe and to continue in effect the practice of the New England colonies with respect to the extradition of criminals. [Authorities omitted.] The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one state and asylum against the processes of justice of another. [Authorities omitted.] Such a provision was necessary to prevent the very general requirement of the state constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than the defense for the innocent, which it was intended to be. Its design was and is in effect, to eliminate, for this purpose, the boundaries of states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land.

"Such being the origin and purpose of those provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally, to effect their important purpose, with

the result that one who leaves the demanding state before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, or who, having committed a crime in one state, returns to his home in another, is nevertheless decided to be a fugitive from justice within their meaning. [Authority omitted.]

"Courts have been free to give this meaning to the Constitution and statutes because, in delivering up an accused person to the authorities of a sister state, they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution, but in the manner provided by the state against the laws of which it is charged that he has offended." (Emphasis added.)

Repeating the comments on an early United States Supreme Court, the Illinois Supreme Court in People ex rel. Guidotti v. Bell, 372 Ill. 572, 576, 25 N.E.2d 45, 48 (1940) remarked:

" . . . We may repeat the thought expressed in Appleyard's Case [203 U.S. 222, 27 S.Ct. 122, 51 L.Ed. 161, 7 Ann.Cas. 1073], above cited, that a faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the states, and that 'while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Consitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.'"

Appellees ask this Court to affirm the decision of

Federal District Judge Ray McNichols.

Respectfully submitted,

ALLAN G. SHEPARD
Attorney General of the
State of Idaho

M. ALLYN DINGEL, JR.
Deputy Attorney General
of the State of Idaho

Attorneys for Appellee
State of Idaho
Statehouse
Boise, Idaho

WAYNE L. KIDWELL
Prosecuting Attorney
Ada County, Idaho

ROBERT C. YOUNGSTROM
Chief Deputy Prosecuting Attorney
Ada County, Idaho

Attorneys for Appellee,
Paul W. Bright, Sheriff of
Ada County, Idaho
Ada County Courthouse
Boise, Idaho

Service of a true and correct copy of the foregoing
brief of Appellees is hereby acknowledged this _____ day of
October, 1966.

DERR and DERR LAW FIRM
515 Vista Avenue
Boise, Idaho

Attorneys for Appellant

CERTIFICATE

I certify that in connection with preparation of this
brief, I have examined Rules 18 and 19 of the United States
Court of Appeals for the Ninth Circuit; and that, in my opinion,
the foregoing brief is in full compliance with those rules.

ALLAN G. SHEPARD
Attorney General of the
State of Idaho

1 See Mr 3389

**In the United States Court of Appeals
for the Ninth Circuit**

SCOTT LUMBER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the United States District Court
for the Eastern District of California**

PETITION OF THE UNITED STATES FOR REHEARING

CLYDE O. MARTZ,
Assistant Attorney General.

JOHN P. HYLAND,
*United States Attorney,
Sacramento, California, 95814.*

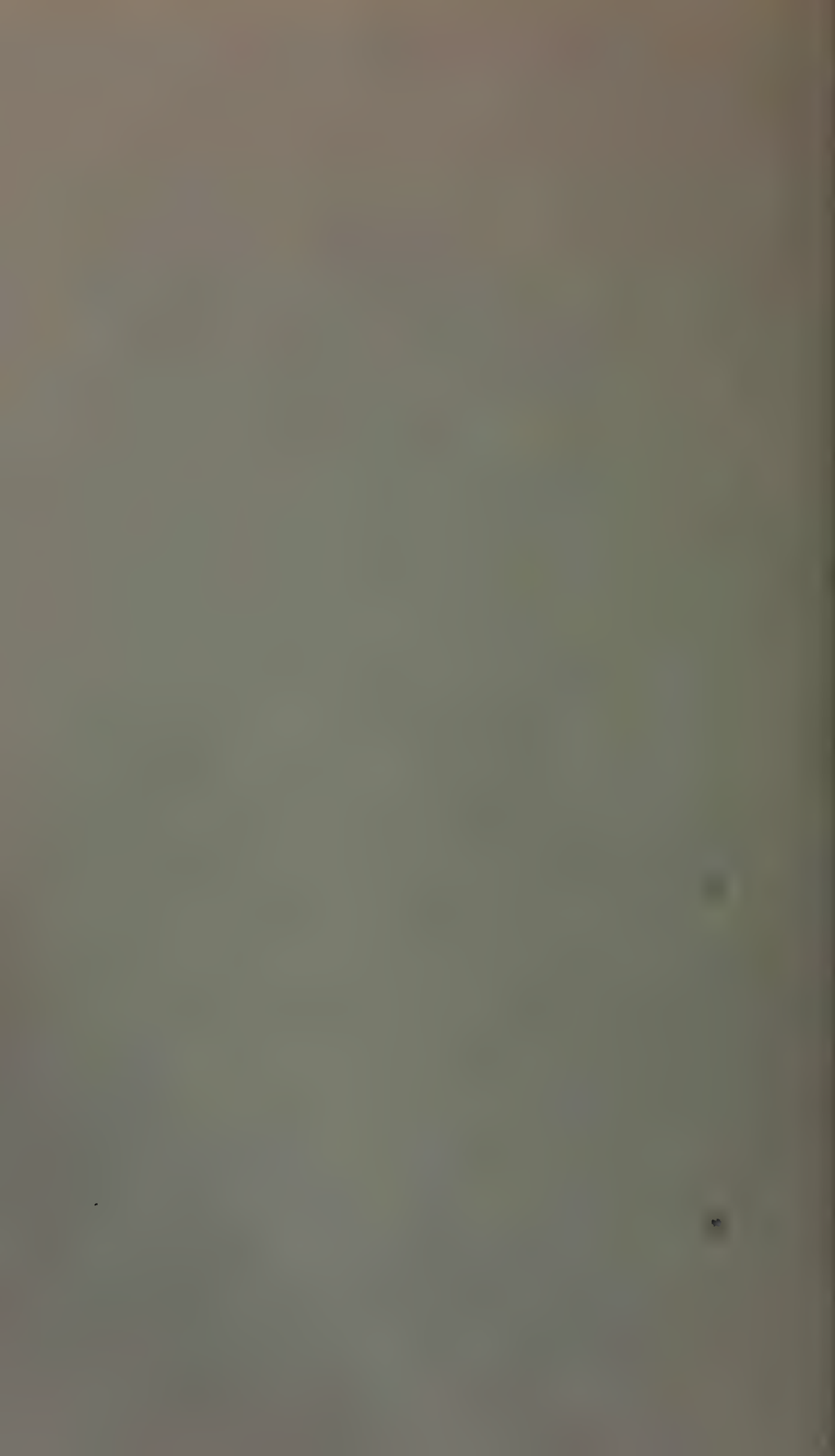
**ROGER P. MARQUIS,
S. BILLINGSLEY HILL,**
*Attorneys, Department of Justice,
Washington, D. C., 20530.*

FILED

MAR 1 1983

MAR 1 1983

WM. B. LUCK, CLERK



**In the United States Court of Appeals
for the Ninth Circuit**

No. 20993

SCOTT LUMBER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**On Appeal from the United States District Court
for the Eastern District of California**

PETITION OF THE UNITED STATES FOR REHEARING

Comes now the United States of America, appellee in the above-entitled cause, and presents this petition for rehearing and in support thereof respectfully shows:

The Court has reversed the judgment of the district court without any showing whatever of error prejudicial to appellant. The Government's valuation witnesses testified that "the highest and most profitable use" of the timberland condemned here was a purchase for immediate harvest of the timber. This Court, contrary to our position, has construed that

to mean "the immediate cutting of all timber on the section leaving only stump land" in violation of the California Forest Practice Act. How did that prejudice appellant?

Not only did the Government's experts say that they were placing the highest valuation on the property, but also, under this Court's view of their testimony, they were inevitably reaching the highest possible valuations by considering the cutting of "*all*" the timber rather than by considering the restrictions of California law. There is not a word in the record to indicate that they would have arrived at higher valuations by any other method than the one they used. Therefore, since their valuations were as high as they could testify to—under this Court's view, even higher than the law permits—there was no prejudice to appellant and this Court's reversal contravenes the requirement of 28 U.S.C. sec. 2111, that appellate courts should "give judgment * * * without regard to errors or defects that do not affect the substantial rights of the parties."

Wherefore, appellee submits that a rehearing should be granted.

Respectfully submitted,

CLYDE O. MARTZ,
Assistant Attorney General.

JOHN P. HYLAND,
*United States Attorney,
Sacramento, California, 95814.*

ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
*Attorneys, Department of Justice,
Washington, D. C., 20530.*

MARCH 1968

CERTIFICATE OF COUNSEL

I, S. Billingsley Hill, counsel for the appellee in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is well-founded and is not presented for the purpose of delay.

S. BILLINGSLEY HILL

See Doc 20995
No. 20995

In the

AUG 10 1968

United States Court of Appeals For the Ninth Circuit

GLYNN RICHARD DAVIS, and
FLORENCE DAVIS, husband
and wife,

Appellants,

v.

WYETH LABORATORIES, INC.,
a New York corporation, and
AMERICAN HOME PRODUCTS
CORPORATION, a Delaware
corporation,

Appellees.

*Appeal from the United States District Court
for the District of Idaho
Southern Division*

PETITION FOR REHEARING

FILED

MAD 22 1968

EBERLE & BERLIN
711½ Bannock St.
Boise, Idaho 83705
Attorneys for Appellees

M. B. LUCK, CLERK



No. 20995

In the

**United States Court of Appeals
For the Ninth Circuit**

GLYNN RICHARD DAVIS, and
FLORENCE DAVIS, husband
and wife,

Appellants,

v.

WYETH LABORATORIES, INC.,
a New York corporation, and
AMERICAN HOME PRODUCTS
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corporation,

Appellees.

*Appeal from the United States District Court
for the District of Idaho
Southern Division*

PETITION FOR REHEARING

EBERLE & BERLIN
711½ Bannock St.
Boise, Idaho 83705
Attorneys for Appellees

COME NOW the Appellees, Wyeth Laboratories, Inc., and American Home Products Corporation, and petition this Honorable Court for a rehearing, *en banc*, in this cause and from the decision of this Court dated January 22, 1968, upon the following grounds:

I.

The opinion of the Court establishes new and far-reaching principles of law and public policy in public and private health programs which were neither fully briefed nor argued before the Court. This opinion should not be fully and finally established as the law without the court being more fully informed by the parties as to the effects of the decision.

II.

The Court erred in deciding that individual physicians can balance the risk with the advantage sought to be obtained from the taking of a vaccine for and on behalf of their individual patients, without imposing a separate duty upon the manufacturer, but that the collective judgment of those physicians that each individual in the population as a whole should take the vaccine imposes an additional and separate duty upon the manufacturer of the vaccine to warn each individual in the population that the judgment of the medical profession may be wrong as to any "risk" involved.

III.

The court erred in deciding that the manufacturer of a vaccine must ignore the decision by the best medical opinion in the area that there was no such medically cognizable risk involved as would make mass immunization clinics "unreasonably dangerous."

IV.

A. The Court erred in finding that the Sabin vaccine, administered to the Appellant, constituted an "experimentation in new drugs" and made of him a "human guinea pig" (Opinion of the Court, page 13). The opinion of the Court fails to recognize in such statements that the vaccine was developed after many years of testing and research, both clinically and in the laboratory, and was released to the general public by the Government only after it met all known standards for "safety, purity and potency."

B. The Court further erred in failing to give legal status to the medical society's evaluation of the risk from the vaccine, if any, to the population, of which the Appellant was an identifiable member in terms of possible risk, and to the finding of the medical society that the vaccine was "fit and its danger reasonable" as to each member of that population.

C. The Court erred in failing to recognize that Appellant was a member of a group (parents with young children) for which the Surgeon General's report specifically recommended vaccination. (See Surgeon General's report, page 5 of the Opinion.) At the time the vaccine was taken by Appellant, he had two children, ages four and six (Tr., pages 122-123).

V.

The opinion of the Court imposes a nondelegable duty upon the manufacturer to warn the ultimate consumer, which is inherently impracticable because of the inability of the manufacturer or its representative to be present at the time of the administration of the

vaccine to the ultimate consumer or to select the ultimate consumer. The drug manufacturer cannot, as a practical matter, control a medical society nor can the manufacturer compel or assure that the medical profession will inform the individual consumer sufficiently to enable him to intelligently evaluate the risk, if any.

VI.

The Court erred in leaving its determination open to the construction that, as a matter of law, no jury question *can* exist relating to *duty to warn* upon a retrial of this action, if such a retrial is finally ordered. Appellant argued *only* that a jury question was presented, and it would be unfair to refuse to allow Appellees to introduce evidence upon this question.

VII.

The Court erred in holding that any failure to warn exposes the vendor to strict liability in tort, without regard to the existence of a casual relationship between the failure to warn and the taking of the vaccine (Opinion of the Court, page 11, lines 23-27; page 16, lines 2-8). Even if Appellees did not warn Appellant, if it is shown that Appellant knew the risk, should have known the risk, or had he known the risk that he still would have taken the vaccine, liability should not be imposed upon Appellees. This Court has imposed liability in the absence of any causal relationship (Opinion of the Court, page 15).

VIII.

The majority opinion of the Court should be revised

on the basis of the following facts which are material and substantive to the matter and which Appellees believe the Court has erroneously omitted and misconstrued:

A. The campaign for the Idaho Falls Medical Society was managed by the Public Health Committee of that society, and specifically by Dr. John Casper, not by Franklin.

B. None of the forms for consent, tallies, and like documents, were taken from material published by Wyeth. Delivery of the vaccine to West Yellowstone was handled by Franklin under the direction of Dr. Casper and was handled by Franklin only insofar as it related to protecting the vaccine until time of use.

C. The printing of forms and immunization cards and posters relating to the polio clinics was handled solely by the medical society. On only one occasion did Franklin deliver material to a printer, but such material had been prepared by the medical society and Franklin acted only as a messenger.

D. The only meeting of doctors arranged by Franklin at his own insistence was instigated specifically for the purpose of making the contents of the Surgeon General's report on the risk of the vaccine known to the medical society. There is no evidence to support a finding that a "fact sheet" prepared by Appellees was in fact printed or used by the medical society in Idaho.

E. No newspaper clippings from Idaho newspapers referred to on page 7 of the Court's opinion contained any assurance by Wyeth relating to the safety of the vaccine. The statements referred to therein were made by members of the medical profession only. There was

no testimony that Appellant saw or read any of those newspaper articles.

F. The evidence shows without contradiction that Appellant examined the vaccine bottle containing a caution label and that the pharmacist himself examined the vaccine bottles, the boxes containing the vaccine, and the literature containing the warnings (Tr. pages 179-180).

WHEREFORE, it is respectfully prayed that the Court grant a rehearing in the above-entitled matter, and, because of the grave public questions presented concerning mass immunization of the public against disease, that this matter be heard before the court *en banc*.

Respectfully submitted

EBERLE & BERLIN

By _____

A Member of the Firm
Attorneys for Appellees
Boise, Idaho

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing in my judgment is well founded on the grounds set forth therein, and that the petition is not interposed for delay.

Attorney for Appellees

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of March, 1968, I mailed a true copy of the foregoing Petition for Rehearing to : Elam, Burke, Jeppesen & Evans, Attorneys at Law, Bank of Idaho Building, Boise, Idaho.

William C. Roden
Attorney for Appellees

No. 20995

In the

AUG 19 1968

**United States Court of Appeals
For the Ninth Circuit**

GLYNN RICHARD DAVIS, and
FLORENCE DAVIS, husband
and wife,

Appellants,

v.

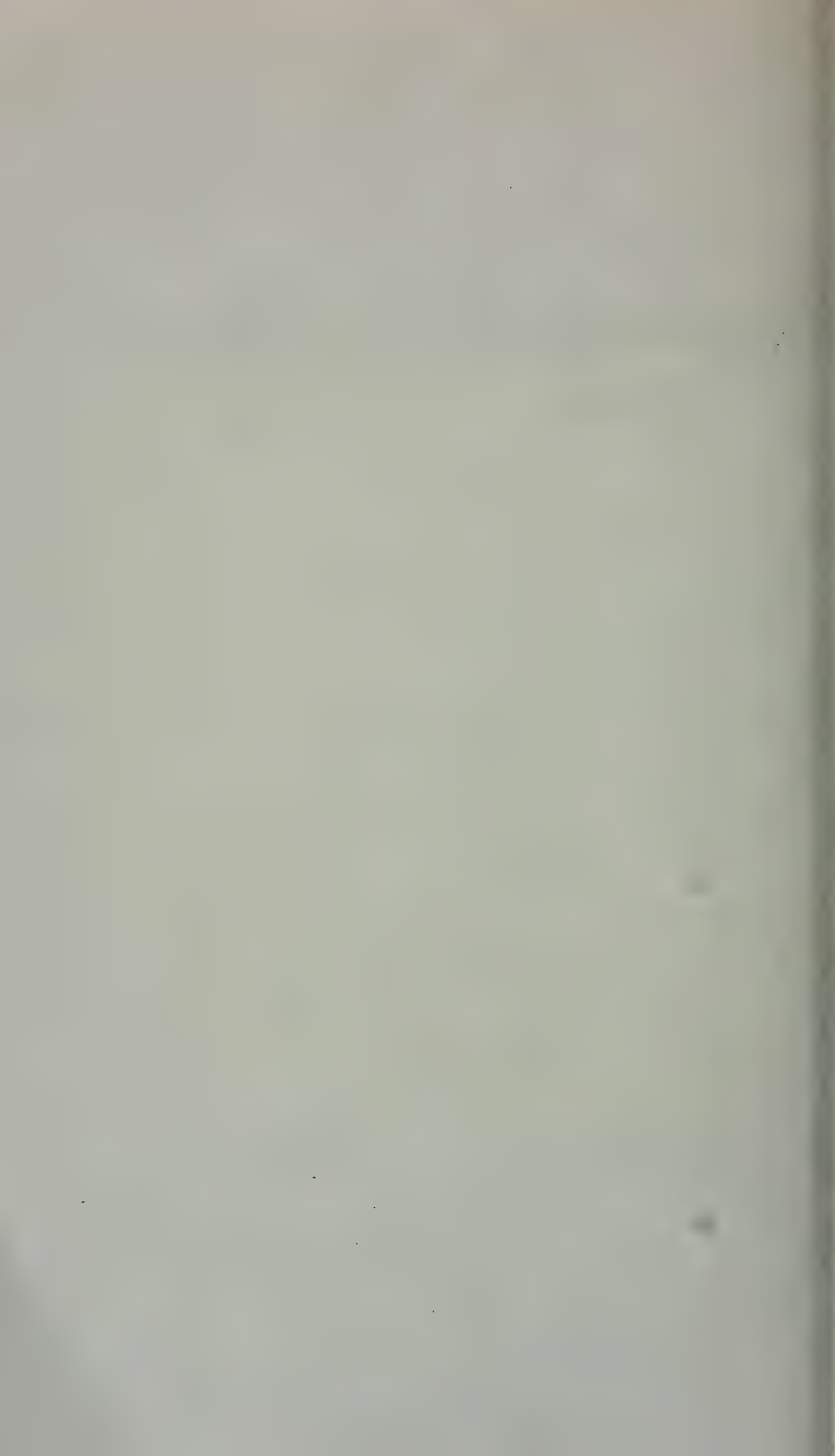
WYETH LABORATORIES, INC.,
a New York Corporation, and
AMERICAN HOME PRODUCTS
CORPORATION, a Delaware
corporation,

Appellees.

*Appeal from the United States District Court
for the District of Idaho
Southern Division*

Answer to Petition for Rehearing

ELAM, BURKE, JEPPESEN & EVANS
Post Office Box 1559
Boise, Idaho 83701
Attorneys for Appellants



No. 20995

In the

**United States Court of Appeals
For the Ninth Circuit**

GLYNN RICHARD DAVIS, and
FLORENCE DAVIS, husband
and wife,

Appellants,

v.

WYETH LABORATORIES, INC.,
a New York Corporation, and
AMERICAN HOME PRODUCTS
CORPORATION, a Delaware
corporation,

Appellees.

*Appeal from the United States District Court
for the District of Idaho
Southern Division*

Answer to Petition for Rehearing

ELAM, BURKE, JEPPESEN & EVANS
Post Office Box 1559
Boise, Idaho 83701
Attorneys for Appellants

Davis vs. Wyeth represents a striking victory for the drug industry. The proposition it set forth to establish was accepted. The standard of safety for a preventative drug is whether the drug is reasonably fit and reasonably safe for use by the public as a whole. Appellants view that the standard be that the drug be safe and fit for him as an individual was rejected. The Court then held that the individual must be warned of the risk to him where the drug house knows, as here, that the physician-patient relationship is absent. To do less than this for a man who has sacrificed for the health of all would be callousness indeed. Subversion of truth in the name of righteousness is nothing new and nothing gained.

The Court does not determine in this case the question of adequacy and method of warning the public except to say that there were many ways in which a warning could have been given by means of advertisements, posters, releases read and signed by recipients of the vaccine or by way of oral warnings. None of these were done in this case. An active advertising campaign was undertaken, participated in by the company, to cause individuals taking the vaccine to believe that it was perfectly safe. If the drug industry can take it upon itself to advise the public of the safety of a vaccine, can it not at the same time warn of the known risks inherent in the vaccine. Safety was the theme of the company's advertisements to the public.

The opinion is carefully tailored to fit the facts of this case and we note the many factual idiosyncracies present and upon which the opinion was based, to-wit:

1. A prescription drug with the knowledge, consent and participation of the drug company was dispensed but not prescribed.

2. With the knowledge of appellee a doctor was not present at the clinic. If he had been, the drug company would have been absolved from liability.

3. There is no legal liability for failure to warn where the drug company does not in fact know of a risk, thus in the instant case there was no liability on the part of the drug company to warn when the drug was first sold.

4. The drug house participated actively in planning the mass immunization clinic program.

5. The drug house furnished press releases, posters and advertising techniques to the medical society, none of which contained a warning.

There was no attempt to decide case by case whether or not the vaccine should be dispensed. It is routine for drug houses to advise the public and doctors of contra-indications of their product. They could easily have done so in this case. The warning could have been contained on the posters and advertisements used, and indeed it would have been a simple matter for Franklin to have warned the pharmacist in West Yellowstone who was in charge of the program. Quite the reverse was done and it was done for business and health reasons. The drug house had a choice. Dick Davis did not, and therein lies the difference and the reason for the opinion.

In paragraph VIII of appellees' Petition for Rehearing, unsupported allegations are made concerning the evidence.

The evidence does not substantiate the statements made on pages 4 and 5 of appellees' Petition. We cite the Court to the following portions of the transcript:

- VIII-A. Testimony of Dr. Willis Melcher, page 202, line 8; testimony of Delmar Edward Simpson, page 248, line 20; page 259, lines 11 and 25; page 261, line 10.
- B. Testimony of James M. Franklin, page 48, line 14; page 59, line 3, line 20; page 60, line 15; page 74, line 24.
- C. Testimony of James M. Franklin, page 48, line 14; page 49, line 15; page 50, line 2; page 74, line 24; page 80, line 9; page 116, line 15.
- D. Testimony of Delmer Edward Simpson, page 248, line 20; page 249, line 25; page 259, line 11; page 259, line 25; page 261, line 10.
- E. Exhibit with the newspaper clippings is presently before this Court.
- F. The pharmacist did not read any literature which accompanied the vaccine bottle. Appellant simply testified that he looked at the vaccine bottle, did not read any cautionary label.

We would, however, reiterate with respect to VIII(f) that Mr. Davis had no knowledge that there was any risk whatsoever in taking the product.

The choices before the court were clear:

1. It could have held that there was no warranty to the individual. No warning need be given and there is no indemnity if the drug is fit for the general public. The minority opinion so held.

2. It could have held there was a warranty of fitness that extends to the individual and the cost of his sacrifice is spread among all who take the vaccine. This view was rejected along with the concomitant theory of the plaintiffs that even so a warning must be given.

3. If the individual is warned, he assumes the risk, and, if stricken, bears the loss. This view was accepted. If not warned, the victim is indemnified.

The decision to warn is that of the drug house. Who else could make it? The drug company manufactures the vaccine and routinely determines dosage, usage, and contra-indications. Only the drug house has the sophistication to make decisions of this nature. The extent to which it seeks to avoid responsibility is well demonstrated in point VIII in which they claim that the pharmacist examined the vaccine bottles, the boxes containing the vaccine and the literature containing the warnings. Such was not the case. The druggist was as ignorant of the risk as was Davis. But what if he had known? How could the law let a drug company divest the responsibility for deciding whether or not to warn to a druggist in West Yellowstone, Montana. The court's decision that the druggist must be told and be required to tell of the risk was eminently sound, sensible and fair.

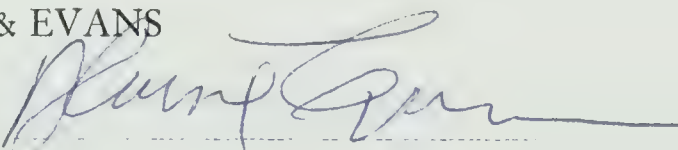
A full trial on the issue of failure to warn was had, consuming some two weeks in length. At the conclusion of the trial the court directed a verdict against the plaintiff, (Tr. P. 923) on this cause of action. The Circuit Court did hold, and the trial court should have held, that there was a failure to warn as a matter of law, as the drug house took the position then, as they do now, that they had no duty to warn and therefore did not warn.

Causation and damages await a re-trial. The issue of legal liability has been resolved against the drug house. The court has advanced the cause of public health while retaining the right of an individual to obtain recourse when a profit making group sells him a product without telling him that there is a risk of contracting the disease that he thinks he is being immunized against.

Respectfully submitted,

ELAM, BURKE, JEPPESEN
& EVANS

By

A handwritten signature in blue ink, appearing to read "Blaine Evans", written over a horizontal line.

Blaine Evans

Karl Jeppesen

Robert J. Koontz

Attorneys for Appellants

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged of receipt of three (3) copies of the above and foregoing brief.

Dated: July-----, 1968.

EBERLE & BERLIN

By -----

Attorneys for Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOMER RAY BROWN,

Appellant,

v.

EDMUND G. BROWN, Governor,
State of California, et al.,

Appellees.

No. 21005

APPELLEES' BRIEF

THOMAS C. LYNCH, Attorney General
of California

ROBERT R. GRANUCCI
Deputy Attorney General

GLORIA F. DeHART
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-0799

Attorneys for Appellees

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOMER RAY BROWN,

Appellant,

v.

No. 21005

EDMUND G. BROWN, Governor,
State of California, et al.,

Appellees.

APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's civil action under Title 42, United States Code, section 1983 was conferred by Title 28, United States Code section 1331. The jurisdiction of this Court is conferred by Title 28, United States Code, section 1291. Proceedings in forma pauperis are authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

Appellant, an inmate of San Quentin Prison, initiated an action under the Federal Civil Rights Act, 42 U.S.C. 1983, for general damages in the amount of \$1,350,000.00, and punitive damages in the amount of \$2,150,000.00 against appellees Edmund G. Brown, the Governor of the State of California, and Lawrence E. Wilson,

the warden of San Quentin Prison. The complaint was filed in the District Court on February 11, 1966 (TR 1)^{1/}. On that same day a summons was issued to the appellees (TR 1).

On March 3, 1966, appellees filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the complaint failed to state a claim against appellees upon which relief could be granted (TR 29). Appellant filed a motion in opposition on March 10, 1966 (TR 36).

In an order filed on March 17, 1966, after consideration of the complaint, the notice of motion and memorandum of points and authorities submitted by defendants, and other documents and papers submitted to the court by appellant, the court granted appellees' motion and dismissed the action (TR 50).

In an order filed on April 20, 1966, the court granted appellant's motion of March 22, 1966 (TR 52) for a certificate of probable cause and leave to appeal in forma pauperis (TR 63).

SUMMARY OF APPELLEES' ARGUMENT

The District Court properly dismissed appellant's complaint for failure to state a cause of action. Inasmuch

1. The Transcript of the Record on Appeal.

as appellant's complaint contains merely conclusionary allegations, it is inadequate to state a claim under the Federal Civil Rights Act. Moreover, his claim of denial of reasonable access to the courts is conclusively rebutted by the papers filed by appellant.

ARGUMENT

In his complaint, appellant makes the following "Claims of Specific Deprivations:"

That appellees have conspired to "harrass [sic], intimidate, terrorize, beat, and abuse" him in an attempt to prevent him from pursuing his "present litigation in the United States Federal District Court numbered Misc. 1299 in the Northern District for California" (TR 8);

That appellees "beat, kicked, knocked, stomped, thrashed, and cursed" appellant to force him to make a statement concerning another case (TR 10);

That appellant has been placed in solitary confinement to accomplish such harassment;

That appellees have confiscated various legal materials and papers pertinent to the above case (TR 11).

In dismissing appellant's cause of action, the District Court characterized his complaints as follows:

"By way of mere conclusionary allegations, the complaint charges defendants with seeking in various generally described ways to obstruct his constitutionally guaranteed reasonable

access to this Court." (TR 50).

The court thus held the complaint inadequate to state a cause of action under the Federal Civil Rights Act. In addition, the court found that appellant's contention that appellees had acted to deny him reasonable access to the District Court was conclusively rebutted both by the papers filed by appellant in this case and by other papers which that court had received from him.

The District Court was clearly correct in this ruling.

In an action for damages under the Federal Civil Rights Act, conclusionary allegations are inadequate to state a cause of action; highly specific facts must be alleged. See, e.g., Pugliano v. Staziak, 231 F.Supp. 347, 349 (W.D. Pa. 1964); Roberts v. Barbosa, 227 F.Supp. 20, 22 (S.D. Calif. 1964); United States v. Bolsinger, 211 F.Supp. 199, 200-01 (W.D. Pa. 1962), aff'd., 311 F.2d 215 (3rd Cir. 1962), cert. denied, 372 U.S. 931 (1963). This rule is a reaction to the common prison technique of harassing and annoying correctional personnel in an effort to undermine prison discipline and control. See, e.g., Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963) (concurring opinion); Pugliano v. Staziak, supra; Roberts v. Barbosa, supra.

"We know from sad experience . . . that imprisoned felons are seldom, if ever, deterred

by the penalties of perjury. They do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court. The prospect of amercing their jailers in damages must be a most tempting one, even if it will not get them their freedom. The disruption of prison discipline that the maintenance of such suits, at government expense, can bring about, is not difficult to imagine." Weller v. Dickson, supra, at 602.

In this suit appellant has asked three and one half million dollars in general and punitive damages for the alleged violations of his rights. The comment of the court in Roberts v. Barbosa, supra at 23, is particularly appropriate in this case. After stating that a witness may be impeached by a conviction, the court observed that there was no sound reason why this salutary rule of law should not induce just a little scepticism concerning the good faith of the prisoner in view of his exorbitant demands. In Roberts the prisoner had asked for slightly more than two and one half million dollars in actual and punitive damages.

In Higgins v. Steele, 195 F.2d 366, 369 (8th Cir. 1952) quoted with approval in Weller v. Dickson, supra, at 602 (concurring opinion), the court observed that although

it is important that no prisoner be denied justice, it is also "important that the prison authorities, government counsel, and the courts be not harassed by patently repetitious, meritless, frivolous or malicious proceedings."

In his complaint, appellant alleges that the appellees have attempted, by beatings and solitary confinement, to deprive him of access to the court in a particular case, but not that he has generally been denied access to the courts. This contention is patently spurious. By his own admission, the case, Brown v. Brown, Misc. 1299, was not only filed in the District Court, but was dismissed by the order of that court, not withdrawn by appellant through any pressure exerted by appellees. See TR 5. Moreover the papers filed by appellant in the instant suit conclusively rebut any allegation that access to the court has been denied him. See Stiltner v. Rhay, 322 F.2d 314, 316 (9th Cir. 1963); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963); Siegel v. Ragen, 88 F.Supp. 996, 1000 (N.D. Ill. 1949), aff'd., 180 F.2d 785 (7th Cir. 1950), cert. denied, 339 U.S. 990 (1950).

The two cases cited by appellant are inapposite to the present case. In one, Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963)(AOB 8), there was a denial of access to the courts. In the other, Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961)(AOB 8), this court upheld the validity of prison regulations limiting the use of legal

materials.

Appellant argues to this court on appeal that although his right to reasonable access to the courts was not "totally obstructed", the assault and solitary confinement designed to prevent such access and to elicit incriminating statements, and the confiscation of legal material constitute cruel and unusual punishment (AOB 7, 9).

An examination of appellant's brief, filed in propria persona, shows the absurdity of his allegation that legal papers pertinent to his litigation in court have been confiscated. While appellant has no absolute right to conduct legal research, see, e.g., In re Chessman, 44 Cal.2d 1, 10 (1955), it is obvious that he has had access, not only to the courts, but to both the record in this case, and to legal papers, documents, and research materials. Obviously, he has had the opportunity to carry out such research.

It is clearly the law that the imposition of solitary confinement does not constitute cruel and unusual punishment nor provide the basis for a cause of action for which relief can be granted under the Civil Rights Act. Harris v. Settle, 322 F.2d 908 (8th Cir. 1963); United States v. Ragen, 237 F.2d 953 (7th Cir. 1956); Roberts v. Barbosa, supra at 23.

Even assuming the truth of appellant's allegation of an alleged attack by the "agents of San Quentin

Prison", the complaint sets forth no more than an assault which would constitute a violation of state law, but does not violate any federally protected right. See, e.g., United States v. Ragen, supra; Miles v. Armstrong, 207 F.2d 284 (7th Cir. 1953); Bryant v. Harrelson, 187 F.Supp. 738 (S.D. Tex. 1960).

None of the cases cited by appellant (AOB 7-9), in support of his assertion that he has properly stated a cause of action under the Civil Rights Act, do in fact support his position. In United States v. Pate, 223 F.Supp. 202 (N.D. Ill. 1963), the complainant had been made ineligible for parole with a consequent extension of his incarceration because he had been labeled incorrigible on the basis of an act done in self-defense. As against a motion to dismiss the court held this sufficient to raise two constitutional issues: (1) whether the power in the warden to lengthen a sentence violated due process of law, and (2) if such power is constitutional, whether its use against a prisoner who acted in self-defense is so out of proportion to the offense as to be cruel and unusual punishment. The situation alleged is thus totally different from the instant case.

Contrast also the situation in Gordon v. Garrson, 77 F.Supp. 477 (E.D. Ill. 1948) cited by the court in United States v. Pate, supra. There the prisoner had alleged inter alia that he had been hit over the head

with a blackjack by an officer, resulting in an infection of the middle ear and complete deafness in that ear. This plus the other specific allegations of mistreatment was held sufficient to state a cause of action.

In Redding v. Pate, 220 F.Supp. 124 (N.D. Ill. 1963), the deprivation alleged was that of essential medical treatment for an epileptic with severe headaches. McCollum v. Mayfield, 130 F.Supp. 112 (N.D. Calif. 1955) also involved the refusal of medical aid. This refusal resulted in permanent paralysis.

United States v. Jackson, 235 F.2d 925 (8th Cir. 1956) involved the sufficiency of an indictment under the Civil Rights Statute, 18 U.S.C. § 242, and not the sufficiency of the allegations of a complaint under section 1983.

Bryant v. Harrelson, supra, directly supports not appellant's, but appellees' position. The prisoner's allegation of a whipping without an allegation of serious physical damage such as that found in Gordon v. Garrson, supra, was held insufficient to state a cause of action under the Civil Rights Act.

It is thus clear that in order to state a claim under the Federal Civil Rights Act, the complaint must allege not only highly specific facts concerning the acts of the state officers but must also be highly specific as to the serious damage resulting. The acts

alleged by appellant in this case thus do not constitute cruel and unusual punishment.

Appellees, of course, do not maintain that appellant has no remedy if he has been improperly assaulted by prison officials or if the conditions of his confinement are improper. Under California State law, a petition for a writ of habeas corpus may be used to correct such conditions. See e.g., In re Riddle, 57 Cal.2d 848 (1962) (cited by appellant AOB 7); In re Ferguson, 55 Cal.2d 663, 669 (1961); In re Chessman, 44 Cal.2d 1, 9 (1955). In addition, state law provides penal sanctions against the conduct appellant alleges in his complaint. See, e.g., Calif. Pen. Code §§ 147, 149, 673, 2650-53.

CONCLUSION

Insofar as appellant's complaint contains relatively specific allegations, the matters complained of do not constitute violations of any federally protected right. The complaint as a whole is largely phrased in merely conclusionary terms and thus fails to state a claim upon which relief can be granted under the Federal Civil Rights Act. As the court observed in United States v. Bolsinger, supra at 201: ". . . if the rule were otherwise, every complaint against a State official by the simple expedient of averring conclusions would be cognizable in the federal courts under the Civil Rights

Act." Moreover, appellant's claim of denial of access to the courts has been conclusively rebutted. For these reasons, it is respectfully requested that the order of the District Court dismissing the complaint be affirmed.

DATED: August 29, 1966

THOMAS C. LYNCH, Attorney General
of California

ROBERT R. GRANUCCI
Deputy Attorney General

Gloria F. DeHart
(MRS.) GLORIA F. DeHART
Deputy Attorney General

Attorneys for Appellees

GFD/gb
CR-SF
66-225

NO. 21009

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPORTSWEAR, LIMITED,
merly REGENCY CREATIONS,
ITED, a corporation,

Appellant

vs.

SWANK SHOP (GUAM) INC.,
corporation,

Appellee

APPELLANT'S OPENING BRIEF

Appeal from Judgment Civil Case No. 58-65

District Court of Guam

Territory of Guam

APPEARANCES:

DAVID M. SHAPIRO
Attorney for Appellant
P. O. Box 864, Agana, Guam 96910

E. R. CRAIN
Attorney for Appellee
P. O. Box 906, Agana, Guam 969

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TSS SPORTSWEAR, LIMITED, formerly REGENCY CREATIONS, LIMITED, a corporation,)	
)	
Appellant)	
)	
vs.)	
)	
THE SWANK SHOP (GUAM) INC., a corporation,)	
)	
Appellee)	

On appeal from the District Court of Guam for the Territory of Guam.

OPENING BRIEF FOR APPELLANT

JURISDICTION

Jurisdiction of the District Court of Guam is based on 48 U.S.C., Section 1424. Jurisdiction of this appeal in this court is based on 28 U.S.C., Sections 1291 and 1294. The complaint (R pages 1 and 2) and amended complaint (R pages 28 to 31) are the pleadings which show the existence of jurisdiction of the District Court of Guam over this action. The notice of appeal (R page 87) is the pleading which shows the existence of the jurisdiction of this court to review the judgment appealed from.

STATEMENT OF THE CASE

A. The pleadings.

Appellant, TSS Sportswear, Limited, formerly Regency Creations, Limited, on November 8, 1965 filed Amended Complaint

Book Accounts and Bills of Exchange against appellee, The Swank Shop (Guam) Inc. (R pages 28 to 31). Count V was abandoned and withdrawn. Counts I, II and III were upon bills of exchange in the sums of \$2,880.56, \$5,439.27 and \$1,985.37, respectively accepted by said appellee but which appellee failed to pay upon presentation. Count IV was balance due by book account. Count I demanded the sum of \$5,179.25 due from appellant to Regency Manufacturing Company, Ltd. by book account and assigned to appellant by the said Regency Manufacturing Company, Ltd.

Appellee filed its answer (denying the allegations contained in plaintiff's amended complaint) and cross-claim December 1, 1965 (R pages 35 to 38) and its "Amendment to Cross-Claim" December 6, 1965 (R page 40). The cross-claim as amended alleged among other things) that David Weire was the sole owner of appellant and Regency Manufacturing Company, Ltd and The Swank Shop, Limited, Hong Kong; that by virtue of contract entered into on or about September, 1963 (Exhibit 7) the said David Weire sold all of his right, title and interest in appellee to Margaret Karlins and Elliott Karlins; that the said David Weire sold The Swank Shop (Guam), Inc. free and clear of all indebtedness (except current indebtedness which was promptly paid); that at the time of the said sale David Weire falsely and fraudulently concealed from the said Margaret Karlins and Elliott Karlins the fact that he intended to make demands upon appellee for large sums of money as a result of alleged inter-company transfers of merchandise and funds between his "alter egos, TSS Sportswear Limited, Regency Creations, Limited, Regency Manufacturing Company, Limited and The Swank Shop (Guam) Inc.;" that the said David Weire caused the books and records of TSS Sportswear, Limited, Regency Creations, Limited and Regency Manufacturing Co., Ltd. to be



did not exist at the time of the sale.

Appellant on December 7, 1965 filed Reply to Cross-Claim (R pages 42 and 43) alleging failure to state claim upon which relief can be granted, and denying the allegations contained in said cross-claim. In addition appellant alleged that appellee (through its manager Margaret Karlins) had full knowledge of the demands set forth in appellant's complaint; that all of the books and records of appellee were in Guam in possession of said Margarett Karlins for at least four months before said sale (Exhibit 7) continuously to the time of filing of appellant's reply and that said books and records affirmatively show the greater part of the indebtedness sued upon.

B. The facts.

The Court, after finding that appellant had made out a prima facie case, required appellee to go forward with its defense, viz. that a fraud had been perpetrated by David Weire upon Margarett Karlins and Elliott Karlins in the sale by him to them of the capital stock of appellee (Exhibit 7); and that by the terms of said sale the indebtedness sued for had been extinguished (T 137, lines 5 to 17; T 197 lines 12 to 26; T 198).

Margarette Karlins testified on behalf of appellee that she and her husband purchased The Swank Shop store for \$22,000.00 in accordance with the terms of an unsigned and undated memorandum (Exhibit A). She testified that David Weire wrote the "top half" and that she wrote the "bottom half" of Exhibit A (T 200, lines 13, 14 and 15); that the "bottom half" was all that portion of Exhibit A beginning with "58-59" (T 203, line 26; T 204, lines 1 to 5; T 205, lines 11 to 18) that the rest of Exhibit A was in the

handwriting of David Weire (T 204, lines 14 to 19; T 205, lines 4 to 10). The Court took over the examination of Mrs. Karlins and by asking leading questions and referring to other Exhibits in evidence caused her to change her testimony as to the amount of inventory at the time of the sale (T 207, lines 13 to 26; T 208; T 209, lines 1 to 20). The conduct of the court is urged as error.

Heath Edwards, handwriting expert for appellant testified that the upper half of Exhibit A was not in the same handwriting as Exhibit 21 (written by David Weire) (T 282, lines 11 to 26; T 283, lines 1 to 3); that a portion of Exhibit A was in the handwriting of Dave Williams (T 285, lines 3 to 13; T 286, lines 3 to 14) and that to the best of his recollection he, Heath Edwards, first saw Exhibit A between April, 1961 and July, 1962 when he was employed by the Bank of Hawaii (T 283, lines 4 to 26; T 284, lines 1 to 22). Notwithstanding this very vital evidence which, if believed by the Court, would nullify Mrs. Karlins testimony, the Court refused to allow appellant's attorney to question Mrs. Karlins, as an adverse witness, concerning the handwriting on Exhibit A. (T 309, lines 9 to 26; T 310 lines 1 to 16). This was certainly error on the Court's part. The Court also refused to allow appellant to question Mrs. Karlins as an adverse witness concerning Exhibit A. (T 306, lines 19 to 26; T 307, lines 1 to 24; T 308, lines 4 to 26; T 309, lines 1 to 8). This was error, especially in view of the fact that Mrs. Karlins had changed her testimony as to the amount of inventory from \$9,000.00 to \$14,000.00 (see discussion above).

The Court refused to receive in evidence the depositions of Sanford Yung, H. K. Choi and Rosalind Lau (T 320, lines 2 to



26; T 321; T 322; T 323; T 324) although a showing was made that these witnesses would testify to a Regency Manufacturing Company account of which David Weire had no control at the time of the sale (T 320, lines 2 to 7). It was the duty of the Court to receive these depositions and determine from the evidence contained therein the validity of Count VI of appellant's amended complaint. Appellant made a showing that David Weire was not permitted to testify concerning the demands of appellant, including Count VI which was for an account due Regency Manufacturing Company at the time of the sale, subsequently assigned to appellant (T 136, lines 23 to 26; T 137, lines 1 to 26; T 138, lines 1 to 21).

Findings of Fact and Conclusions of Law were filed March 4, 1966 (R pages 83 and 84) and Judgment (R page 85) was entered on March 4, 1966 that plaintiff take nothing by its complaint and that defendant have judgment for its costs and disbursements in the sum of \$817.43. On March 28, 1966 appellant filed Notice of Appeal from said judgment. (R page 87)

ERRORS RELIED UPON

The following are the errors upon which appellant relies:

I. The trial court erred in refusing to receive in evidence the depositions of Sanford Yung, H. K. Choi and Rosalind Lau.

II. The trial court erred in refusing to receive in evidence testimony of David Weire as to the indebtedness sued upon in appellant's amended complaint.

III. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to



answer the following question (T 310, pages 1 to 4) viz.:

"Q. (By Mr. Shapiro) You heard Heath Edwards state that the first line "'What does business own'" was signed by David Williams. Do you deny that he signed that?"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 310, lines 4 to 16):

"Mr. Crain: I object to that. She has already testified to that."

"The Court: That is the very question she testified to before and she said Mr. Weire. You have again repeated--"

"Mr. Shapiro: If your Honor please, I have not asked that question and I would ask the Reporter read back the question to determine whether or not I did ask it."

"The Court: The record will show that the witness was asked and insisted that the top portion of Exhibit A was written by Mr. Weire."

"Mr. Shapiro: The plaintiff contends that he has a right to cross examine."

"The Court: The Court has ruled. Go to your next question."

IV. The trial court erred in refusing to permit Margarett Karlins (who was called as an adverse witness for appellant) to answer the following question (T 309, lines 9 and 10) viz.:

"Q. (By Mr. Shapiro) You heard Mr. Edwards' testimony as to who wrote this memorandum. Do you still state that Mr. Weire--"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 309, lines 11 to 17):

"The Court: Mr. Shapiro, the witness, the first question you asked her was whether she still stated that and she said yes."

"Mr. Shapiro: If your Honor please, I did not ask her this question."

"The Court: You did ask her as your first question, you took Exhibit A and asked her to state whether she

still said that was what Mr. Weire had put down."

V. The trial court erred in refusing to permit Margarett Karlins (who was called as an adverse witness for appellant) to answer the following question (T 304, lines 1, 2, 5, 6, 7), viz.:

"Q. (By Mr. Shapiro) Mrs. Karlins, I will ask you to look at Defendant's Exhibit A."

"Q. (By Mr. Shapiro) Now you state that that contains the agreement between you and Mr. Weire concerning the sale of the stock in Swank Shop (Guam), Inc., is that right?

The court answered the question instead of Mrs. Karlins (T 305, lines 8 to 15), viz.:

"The Court: The witness, Mr. Shapiro testified that Mr. Weire came to the Swank Shop, spent the morning, that he put down certain figures, called her in and said "Maggie what will you give for this?" And they talked it over and that these figures were put down his at the top and hers at the bottom."

"Mr. Shapiro: Yes, sir."

"The Court: And that after coming to an agreement as to \$22,000.00 they went to see Mr. Gayle. Now that was her testimony."

VI. The trial court erred in refusing to permit Margarett Karlins (who was called as an adverse witness for appellant) to answer the following question (T 306, line 19) viz.:

"Q. (By Mr. Shapiro) Now how did you arrive at that \$22,000.00?"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 306, lines 20 to 26; T 307, lines 1 to 24).

"A. I beg your pardon?

"Q. Will you please tell me how you arrived at that \$22,000.00 figure?"

"Mr. Crain: If your Honor please, the Court just told him how she arrived at that."

"Mr. Shapiro: If your Honor please, the Court is not testifying. I am asking--"

"The Court: The witness has previously testified--"

"Mr. Shapiro: I am asking the witness to testify as to how she arrived at the \$22,000."

"Mr. Crain: This is improper examination."

"The Court: I don't think it is improper examination except that it was gone over previously and you cross examined previously on it."

"Mr. Crain: That's right."

"Mr. Shapiro: I don't recall her itemizing the amounts and I will ask that Mrs. Karlins state what the \$22,000 consisted of. If your Honor please, this is a vital matter here. Here we have a \$4200 figure here. Mrs. Karlins states she chose to pay \$22,000. Now I would like to know what the \$22,000 consisted of."

"Mr. Crain: This was all part of the cross examination conducted yesterday."

"The Court: This she already told you what it was."

"Mr. Shapiro: I am asking her what the \$22,000 consisted of. I am entitled to know it, if your Honor please. This is a vital part here. Actually, the contract shows \$22,000 and shouldn't be inquired into it at all but there has been an inquiry into it."

"The Court: You just stated Mrs. Karlins previous testimony was (a), the automobile, (b), the inventory, (c), the furniture."

"Mr. Shapiro: If your Honor please, I object to your Honor testifying as to what it is."

VII. The trial court erred in refusing to permit Margarett Karlins (who was called as an adverse witness for appellant) to answer the following question (T 308, lines 4 to 7), viz.:

"Q. (By Mr. Shapiro) Mrs. Karlins, will you please itemize the amounts making up the \$22,000 which you paid to, which you and your husband paid to Mr. Weire for the purchase price of the stock in Guam Swank Shop, Inc.?"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 308, lines 8 to 26; T 309, lines 1 to 7).

"Mr. Crain: That is the same question, your Honor, just rephrased."

"The Court: That is the same question that was answered and the witness was cross examined upon it before when she testified previously."

"Q. (By Mr. Shapiro) What was your previous testimony as to what the \$22,000 consisted of?"

"Mr. Crain: The record speaks for itself."

"The Court: That question is improper. Whatever her previous testimony is is in the record. The Court will not permit you to go over it a second time, what you cross examined her on before."

"Mr. Shapiro: The plaintiff wishes to make a showing that Mrs. Karlins cannot make up the figures of the \$22,000 and we wish, I wish to take an exception to the Court's ruling."

"The Court: Very well, exception noted."

"Mr. Shapiro: And exception to the Court's ruling for not allowing me to cross examine on this very vital point."

"The Court: The Court's ruling is that you have previously cross examined on this very vital point and the Court will not permit you to take up time going over the same matter again."

"Mr. Shapiro: The Plaintiff's attorney represents that he did not ask her what the \$22,000 was made up of."

"The Court: The Court has ruled, Mr. Shapiro."

"Mr. Shapiro: May I make the record so I will have a good record, if your Honor please?"

"The Court: The record will show whatever the record shows."

VIII. The trial court erred in taking over the examination of Margarett Karlins and by asking leading questions and referring to exhibits in evidence causing her to change her testimony as to the amount of inventory at the time of the sale (T 207, lines 13 to 26; T 208; T 209 lines 1 to 20, as follows).

"The Court: And what about the \$5000 it showed there as being owed, who was going to pay that?"

"A. That was included in the \$9000 that was the inventory of the store. The inventory was \$9000 but \$5000 of it was still owed."

"Q. (By Mr. Crain) You mean you agreed to pay the--"

"A. Uh huh."

"Q. --pay for that merchandise that wasn't paid for?"

"A. Uh huh."

"Q. And you did pay for it subsequently, didn't you?"

"A. Yes, I did."

"The Court: What you are saying, I believe, is that the \$5000 was deducted from the inventory. The inventory was roughly \$14,000, wasn't it?"

"A. No, it was \$9000."

"Mr. Crain: It was added back in then as a figure that was owed."

"The Court: Huh?"

"Mr. Crain: It was added back in as a part of the \$22,000 consideration."

"The Court: What I am getting at is who is to pay the \$5000?"

"Mr. Crain: She was."

"A. I did."

"The Court: So that the actual consideration, then, for everything free and clear, as you understood it, would be \$27,000."

"A. No, \$22,000."

"Q. (By Mr. Crain) It was to be \$22,000 for what you were buying but were you assuming that obligation of those remaining bills? Isn't that correct, isn't that what your understanding was?"

"A. Yes. There were no outstanding bills. This was to wipe out the outstanding bills, clean."

"Q. Including the \$5000 that he said was owed? I'm confused too, I'm sorry."

"A. You are confusing me."

"Mr. Crain: I think the Court had the right question."

"The Court: Did you say you would pay the \$5000?"

"A. Yes, I would pay the \$5000 that was owing."

"The Court: And did you pay it?"

"A. We paid it on the D/A's after, yes, we did."

"The Court: You remember, Mrs. Karlins, what was your inventory worth? Now, according to this balance sheet as it was originally prepared as of January 31st, your inventory as of January 31st was \$12,332, 1962, and was \$14,060.16 as of January 31st, 1963. During the period it increased \$2000. Now had it gone down from \$14,000 to \$9000 before the time you bought this store?"

"A. Could I present the inventory sheet as of September 1, Judge?"

"The Court: What was your inventory as of the time you bought the store, was it \$14,000 or \$9000?"

"A. \$14,000."



"The Court: \$14,000?"

"A. Uh huh."

"The Court: Then when you say \$9000, you meant that the net inventory after you paid for it. You would pay out \$5000 and for purposes of sale it was worth \$14,000 less the \$5000 which you had yet to pay, or \$9000."

"A. That's right."

"The Court: All right, that is what I said a few minutes ago and you said no."

"Mr. Crain: I confused her, your Honor. I'm sorry."

IX. The trial court erred in refusing to receive in evidence Exhibit 24 for identification and in further refusing to permit Plaintiff's attorney to make a showing for the record as to the contents of said Exhibit 24 for identification (T 314, lines 24-26; T 315; T 316, lines 1 to 11).

"Q. (By Mr. Shapiro) I show you Plaintiff's Exhibit 24 for identification. Will you state what that is?"

"A. This is a letter on the Bank of Hawaii, Guam branch, Agana, Guam, stationery, dated September 5, 1962."

"Q. Don't read it, it speaks for itself."

"The Court: September 5th, 1962?"

"A. Yes, sir."

"The Court: What has that got to do with this?"

"Mr. Shapiro: It has to do with the fact Mrs. Karlins was negotiating for the sale of the business of the stock at that time and it ties in with Mr. Edwards' testimony that dealings were had with the Bank of Hawaii by Mrs. Karlins and it corroborates that testimony."

"The Court: The Court will hold that it is too remote to have any bearing or any relevancy on a sale consummated in August, 1963."

"Mr. Shapiro: If your Honor please, the testimony of Mr. Edwards--"

"The Court: The Court has just ruled. Now go to your next question."

"Mr. Shapiro: Yes, sir. I just merely wanted to make the record straight. The plaintiff wishes to make a showing that Plaintiff's Exhibit No. 24--"

"The Court: The Court has just ruled. Now ask the witness another question or the witness will be asked to step down."

Mr. Shapiro: In your honor please, I would like to make a showing for the record."

"The Court: You have preserved your record."

"Mr. Shapiro: May I make a showing, please?"

"The Court: You may not make a showing."

"Mr. Shapiro: I may not make a showing of what the letter shows?"

"The Court: You are talking about a transaction in September of 1962 which has no bearing upon what happened in August of 1963."

"Mr. Shapiro: Well, if your Honor please, it is your opinion that it has no bearing but I feel that it has otherwise and I think if I am permitted to make a showing as to what I will prove by the letter--"

"The Court: Mr. Shapiro, ask the witness another question or ask him to step down, one or the other."

X. The trial court erred in receiving evidence of Margarett Karlins (T 199, line 6 to T 212, line 12) which contradicted the written agreement between David Weire and Margarett Karlins and Elliott Karlins (Exhibit 7).

XI. The trial court was biased and prejudiced against appellant. The following excerpts from the record show such bias and prejudice.

T 2, lines 22 to 24: "The Court: We have tried one case and I think it is fairly clear in that case that Mr. Weire is the alter ego of these various corporations."

T 3, lines 8 to 14: "The Court: Then your assumption is that Mr. Weire was the alter ego of these corporations."

"Mr. Crain: Both in Guam and in Hong Kong."

"The Court: Certainly in Guam, and that as the alter ego of the Hong Kong corporations, the selling of the stock and the receipt of the consideration wiped out, was an agreement to wipe out the existing indebtedness."

T 7, lines 21 to 26: "The Court: The court at this moment, of course, is familiar with the machinations which went on in connection with these various corporations so we have very little sympathy with your problem because it was perfectly clear at the previous trial that the suing corporation there was composed of Weire and a couple of other people, that Weire then formed a different corporation with a similar name--"



T 8, lines 12 to 15: "The Court: Then you have the intervention of the third corporation, TSS corporation, and, frankly, the entire thing has an odor about it which will have to be cleared up because throughout here we find, predominant, Weire, always in the thing."

T 9, lines 4 to 9: "The Court: I am not certain, but Weire's salient hand appears in everything. I want to get this thing down to a point as to whether The Swank Shop owes Weire because Weire is the key to this entire thing, and what, specifically, what, at the time the Swank Shop was purchased, was it purchased with knowledge of the outstanding indebtedness."

T 9, lines 14 to 19: "The Court: On the other hand, if all the books were kept by Weire and not shown-- It already appears rather clear that Mr. Arriola acted with conflicting interest in representing both the purchaser and the seller and, as the Court pointed out at the original trial, the cutthroat type of agreement the parties entered into was unconscionable..."

T 14, lines 11 to 26; T 15, lines 1 to 11: "Mr. Shapiro: May I ask that-- Mr. Weire can't get here upon the 7th. He did tell me he can get here upon the 14th. Would you put this off until the 14th and I will try to get him here?"

"The Court: I will not put it off until the 14th. Mr. Weire is an American businessman that sought the assistance of this court. Now let him come in and testify."

"Mr. Shapiro: That is why he filed the deposition, at least. Now I am asking the Court to continue it for a week so that I can get him here."

"The Court: The Court is denying it because this is now, as of today, gives Mr. Weire ample time to come from Hong Kong to Guam."

"Mr. Shapiro: He has other urgent business."

"The Court: This court is not set up for the purpose of accommodating Mr. Weire or any other litigant."

"Mr. Shapiro: Well, depositions are filed. If the plane can't get here, depositions are customarily used."

"The Court: Mr. Shapiro, the Court, as you just stated, the Court would rule upon your motion. The Court has ruled and has again ruled that the case is set for trial on February 7 and we expect to proceed at that time with Mr. Weire present in Court."

"Mr. Shapiro: I will file a formal motion for continuance."

"The Court: There is no need to file a formal motion for continuance because unless you are prepared to proceed, as the Court has indicated, upon February 7, the plaintiff, the complaint will be dismissed and the Court will proceed to evidence upon the defendant's cross complaint."

(Attention is also called to excerpts from transcript of evidence under specification of errors Nos. III to X, inclusive).

XII. Appellant was denied a fair trial.

Reference is made to excerpts from transcript of evidence under specification of errors Nos. III to XI, inclusive).

ARGUMENT

A. Summary.

In this action the appellant was denied its day in court, having been deprived of a fair trial. (1) Depositions of appellant's material witnesses were arbitrarily excluded entirely from evidence. (2) Appellant's president was not permitted to testify concerning the demands contained in its amended complaint. (3) The trial court refused to permit appellant's attorney to fully examine the president of appellee as an adverse witness. (4) The trial court took over the examination of appellee's president and by asking leading questions and referring to exhibits in evidence caused her to change her previously positive testimony. (5) The trial court pre-judged the case and (as set out in paragraph 4 above) caused appellee's president to testify so as to destroy the credibility to appellee's very tenuous defense. (6) The trial court refused to permit appellant to call its witnesses in the order prescribed by appellant's attorney. (7) The trial judge was prejudiced and biased, assuming the role of an advocate for appellee.

Appellant submits that the record clearly shows that in truth and fact the trial court entered its judgment in favor of appellee on the basis of a matter not in issue.

The issue announced by the court was alleged fraud



perpetrated upon the president of defendant and her husband and not
the alleged harshness of the contract (Exhibit 7) which was never
rescinded despite the fact that the said president within several
months after the execution of said contract was fully apprised of
the demands contained in appellant's complaint. If the real issue
is fraud, why did the trial court permit appellee to cross examine
(and itself actively to examine) Mr. Weire at length upon the
demands set out in appellant's amended complaint which for the time
being at least was not in issue (T 142, lines 7 to 26; T 143 to
16; T 154 to 172). Why did the trial court in its opinion (T 325
to T 333) speak mostly of the alleged unfairness of the contract
(Exhibit 7), if the real issue was fraud? The effect then of the
trial court's reasoning is that because the contract (Exhibit 7)
is harsh, judgment should be entered in favor of appellee on the
issue of fraud. The said contract (Exhibit 7) entered into between
David Weire and Margarette Karlins for the sale of the capital
stock of appellee is a valid, legal contract, relied upon by
appellee - appellee did not set aside the contract after full knowl-
edge of appellant's demands. Parties have a right to contract on
whatever terms they deem advisable. As stated by the court, Mr.
Weire had a right to make the best bargain obtainable for the sale
of his stock. The alleged harshness of that bargain is immaterial.
A valid contract cannot be set aside if it is later decided by one
of the parties that a hard bargain was made.

It is noted that the Court refers to a previous case,
viz.: Regency Manufacturing Company vs. Appellee. (Since the record
in that case was not submitted, the court cannot base its decision
thereon). Appellant represents that said record will show that the
demand of Regency Manufacturing Company was admitted by appellee

in that action - recovery was allowed, subject to a set-off for commissions. The stand taken by appellee that all debts were cancelled is inconsistent with said judgment.

The testimony then of Margarett Karlins, to the effect that the demands contained in appellant's amended complaint were released, should have been excluded, since said testimony contradicted the terms of the written agreement between David Weire and Margarett Karlins and Elliott Karlins (Exhibit 7). The defense of fraud would not make this testimony admissible because it clearly appears from the testimony of Margarett Karlins that she knew or should have known of appellant's demands at the time of executing the said agreement (Exhibit 7) - knowing that these debts existed, it was incumbent upon her to provide in said agreement that said demands were released and satisfied, if that was the intention of the parties. Evidently, there was no agreement to release and satisfy said demands, as said agreement did not release same.

B. Argument Proper.

I. The trial court erred in refusing to receive in evidence the depositions of Sanford Yung, H. K. Choi and Rosalind Lau.

(Reference is made to the last two lines page 4 of this brief and the top half of page 5 thereof).

Following are excerpts from the record dealing with the exclusion of said depositions:

T 320, lines 2 to 26; T 321 to T 324: "Mr. Shapiro: That is an account of Regency Manufacturing Company which Mr. Weire had no control over at that time. He could not have released that account and the evidence of the depositions will so show it. At this time I wish to offer in evidence the depositions of Chung Liang Lee, Sanford Yung, H. K. Choi, as witnesses on behalf of the plaintiff."

"The Court: I will receive any evidence and any depositions showing that Mr. Weire had not paid this indebtedness as of June, or as of August 28, 1963."

"Mr. Shapiro: All right, sir, I am offering all of these in evidence at this time and I, specifically the deposition of Chung Liang Lee concerns this indebtedness that I was talking about, Sanford Yung, H. K. Choy and Rosalind Lau."

"The Court: All right, point to the places in the depositions which deal with these, this particular matter."

"Mr. Shapiro: The entire deposition of Chung Liang Lee."

"The Court: You want the Court to take into evidence the entire deposition and then find out what is germane, is that it?"

"Mr. Shapiro: I am representing, if your Honor please, that this deposition has only to do with Regency Manufacturing Company indebtedness which was assigned to Regency Creations."

"The Court: Assigned to Regency Creations."

"Mr. Shapiro: Yes, sir, and I wish to also ask Mr. Weire--"

"The Court: Now, Mr. Shapiro, let's not have any mistake about this. This was an amount which Mr. Weire paid to Regency Manufacturing."

"Mr. Shapiro: Which he bought the account from Regency Manufacturing."

"The Court: When did he buy the account from Regency Manufacturing?"

"Mr. Shapiro: He didn't buy it, Regency Creations purchased it. It was subsequent to October of 1963."

"The Court: It was assigned subsequent."

"Mr. Shapiro: It was purchased subsequent and assigned subsequently also."

"The Court: Now you are stating; you are familiar with all of these actions; you are stating that Mr. Weire did not purchase this claim from Regency Manufacturing."

"Mr. Shapiro: He did purchase it after October of '63 after the deal for the sale of the stock had been consummated. The depositions will show that, if your Honor please, and I will refer you to them."

"The Court: What I want to see is where there is any reference to that."

"Mr. Shapiro: All right, sir, the depositions speak for themselves and those, Chung Liang--"

"The Court: I have the depositions before me. Point out at that point in the deposition that you want introduc-

ed the references to the particular question."

"Mr. Shapiro: I wish the entire deposition of Chung Liang Lee to be introduced in evidence because it concerns Count VI entirely, has nothing to do with any of the other counts in the complaint. Likewise, the entire deposition of Sanford Yung, H. K. Choi and Rosiland Lau. They merely concern the indebtedness due from Swank Shop (Guam) to Regency Manufacturing, which was assigned to Regency Creations after October of 1963. Now I can't separate it, it is all there, if your Honor please."

"Mr. Crain: It was my understanding that the Court had already dismissed Count VI and Count IV was the only count left in the complaint."

"The Court: What the Court is holding is that anything that, on August, between these parties on August 28, that Weire or Regency Creations had which could be a claim against the Swank Shop, Inc. in Guam were wiped out by that sale, all."

"Mr. Shapiro: This is not held by Regency Manufacturing. I mean this isn't held by Regency Creations."

"The Court: That is what I am trying to say to you, Mr. Shapiro, that the Court will receive evidence as to any claims that, that they were due to somebody else, but claims which arose subsequent to August 28."

"Mr. Shapiro: And that is what I am trying to explain to the Court, that those four depositions cover such claims, and also the testimony of Mr. Weire to identify the assignments of those claims."

"The Court: Now I want to know when Weire paid off Regency Manufacturing, where does that show in the deposition?"

"Mr. Shapiro: It shows in the deposition. The bookkeeper shows it and also Mrs. Lau."

"The Court: All right, just show me where it appears, Mr. Shapiro."

"Mr. Shapiro: All right, sir."

"The Court: You took the deposition."

"Mr. Shapiro: I think the whole deposition is pertinent, myself."

"The Court: I am not asking you what you think is pertinent yourself. I am asking you where it appears in the deposition that, as to the date when Mr. Weire paid off Regency Manufacturing."

"Mr. Shapiro: All right, sir, I will find it. It would appear in Mrs. Choi's. I'll find it."

"The Court: I take it we are talking about now the amounts received by Mrs. Karlins in trust from the, either Andersen or the Navy Exchange."

"Mr. Shapiro: No, we are waiving that."

"The Court: And not Regency Manufacturing."

"Mr. Crain: He says he is waiving that, they are not claiming that."

"Mr. Shapiro: To Regency Manufacturing. Just a minute."

"The Court: Are these bills that were of purchases subsequent to October?"

"Mr. Shapiro: Yes, sir, this was paid subsequent to October 13, 1963. I think I can find it in the depositions."

"The Court: What I want to know is did it exist on August 28, 1963?"

"Mr. Shapiro: Yes, it did. The obligation, yes, it did."

"Mr. Crain: It went back to 1961."

"The Court: Then if it--"

"Mr. Shapiro: Mrs. Lee attached an itemized list to her deposition."

"The Court: Then if it existed on August 28, then it is included in the agreement."

"Mr. Crain: In the sale."

"Mr. Shapiro: Mr. Weire had no control over that account until October of '63 when he purchased it."

"Mr. Crain: It is rather coincidental that he purchased it when he was kicked out."

"The Court: Well, that will be stricken. Mr. Crain is also fond of testifying."

"Mr. Crain: I'm sorry."

"The Court: Are you prepared to point to anything, Mr. Shapiro?"

"Mr. Shapiro: Here it is. It shows on here all right. It is in here and Mr. Weire can testify to it also."

"The Court: Well, you took the depositions."

"Mr. Crain: The books will speak for themselves."

"Mr. Shapiro: If your Honor please, I am distraught now and, frankly, it is hard for me to keep my mind on the work, but it is in here."

"The Court: Very well, the Court will hear final argument."

"Mr. Shapiro: Your Honor has dismissed the complaint, why does he have to have final argument?"

T 333, lines 13 to 26; T 334; T 335, lines 1 to 17:

"Mr. Shapiro: If your Honor please, the plaintiff

wishes to, the record to show that Count V of the complaint is for the sum of \$5,179.25, which was due from the defendant to Regency Manufacturing Company, Ltd.; that as to that account Mr. Weire had no control over that. He never did own control of Regency Manufacturing Company. He was not the managing director of Regency Manufacturing Company and he had no authority to release any debts of Regency Manufacturing Company, Ltd. The plaintiff wishes the record--"

"The Court: The Court has assumed that the indebtedness upon which that was based existed on August 28, 1963; that when Mr. Weire paid off the indebtedness and assigned it to Regency Creations, that was their business. Regency Manufacturing said You owe this and he said I'll pay it, and subsequently assigned it to Regency Creations. But since it was in existence on August 28, 1963, it is part of the Regency-Weire settlement with the Karlins."

"Mr. Shapiro: May I complete my showing, if your Honor please?"

"The Court: Yes, very well."

"Mr. Shapiro: I don't think your Honor has read the depositions or heard Mr. Weire's testimony as to the ownership of stock, and so forth. Now we expect the evidence of Mr. David Weire would have shown that he had no control of Regency Manufacturing Company and that this indebtedness was assigned to him subsequent to October of 1963; that subsequent to October 1st, 1963, I believe October 19, 1963, he paid that and received an assignment of the indebtedness from Regency Manufacturing Company; that this is an independent account, has nothing to do with Regency Creations. That is what the evidence will show."

"The defendant--the plaintiff also wishes the record to show that his Honor, the Court, refused to accept the depositions or to read the depositions of Sanford Yung, H. K. Choi, Rosiland Lau. The latter, Rolisland Lau, is the managing director of Regency Manufacturing Company and her testimony would have clarified the whole matter, including the assignments covered by Count VI."

"Plaintiff wishes to further show that Mr. Weire, himself, would have testified as to this account and as to payments and for the assignment, and that the Court refused to allow him to testify, and also Chung Liang Lee, Sanford Yung, H. K. Choi, Rosiland Lau."

"The Court: The record will show that the Court asked counsel to point out anywhere in the depositions or any testimony that the indebtedness referred to was not in existence as of August 28, 1963, and received no such information."

"Mr. Shapiro: And the plaintiff's attorney stated that Mr. Weire would have testified from the books of



Regency Creations when that amount was paid and when the assignment was. The plaintiff also requested that he be allowed to identify the assignment of the accounts. The Court refused to allow him to do that."

"The Court: The Court held that that was entirely immaterial until you had laid the groundwork that the indebtedness accrued subsequent to August 28."

"Mr. Shapiro: The plaintiff feels he has been denied his day in court."

Appellant urges that, as to Count VI of appellant's amended complaint the evidence would have shown that David Weire did not have control of Regency Manufacturing Company, that he was minority stockholder, that he was not managing director, that at the time of the execution of the agreement (Exhibit 7) the sum owed upon was owed to Regency Manufacturing Company, that the said David Weire had no authority to compromise that claim and that he was not the alter ego of Regency Manufacturing Company. The depositions should have therefore been received under Count I of appellant's amended complaint.

20 Am. Jur. 240, Section 246: "...On the other hand, all facts and circumstances which are relevant to the issues - that is, all facts and circumstances which afford reasonable inferences or throw light upon the matter or matters contested - are admissible in evidence, unless the exclusion of any such fact or circumstance is required by some established principle of evidence, such as the hearsay evidence rule, the best evidence rule, or the rule that parol evidence may not be given to vary or contradict written instruments..."

20 Am. Jur. 240, 241, Section 247: "...Generally, it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue is relevant and admissible..."

20 Am. Jur. 245, 246, Section 252: "The fact that evidence tending to prove an issue or constituting

a link in the chain of proof does not, standing alone, justify a verdict does not render it inadmissible under the rules of relevancy. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact; relevancy is that quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue. Evidence which tends to prove a fact, regardless of how slight such tendency is, should be admitted upon the trial. Such evidence is competent, relevant, and admissible, although it may not be such as will independently establish a fact at issue..."

II. The trial court erred in refusing to receive in evidence testimony of David Weire as to the indebtedness sued upon in appellant's amended complaint.

Reference is made to argument, authorities and excerpts from record in Specification of Error No. I, which is concerned with Count VI of appellant's amended complaint.

Mr. Weire would have testified fully as to said Count VI and also as to all demands contained in appellant's amended complaint. The rejection of his testimony was error.

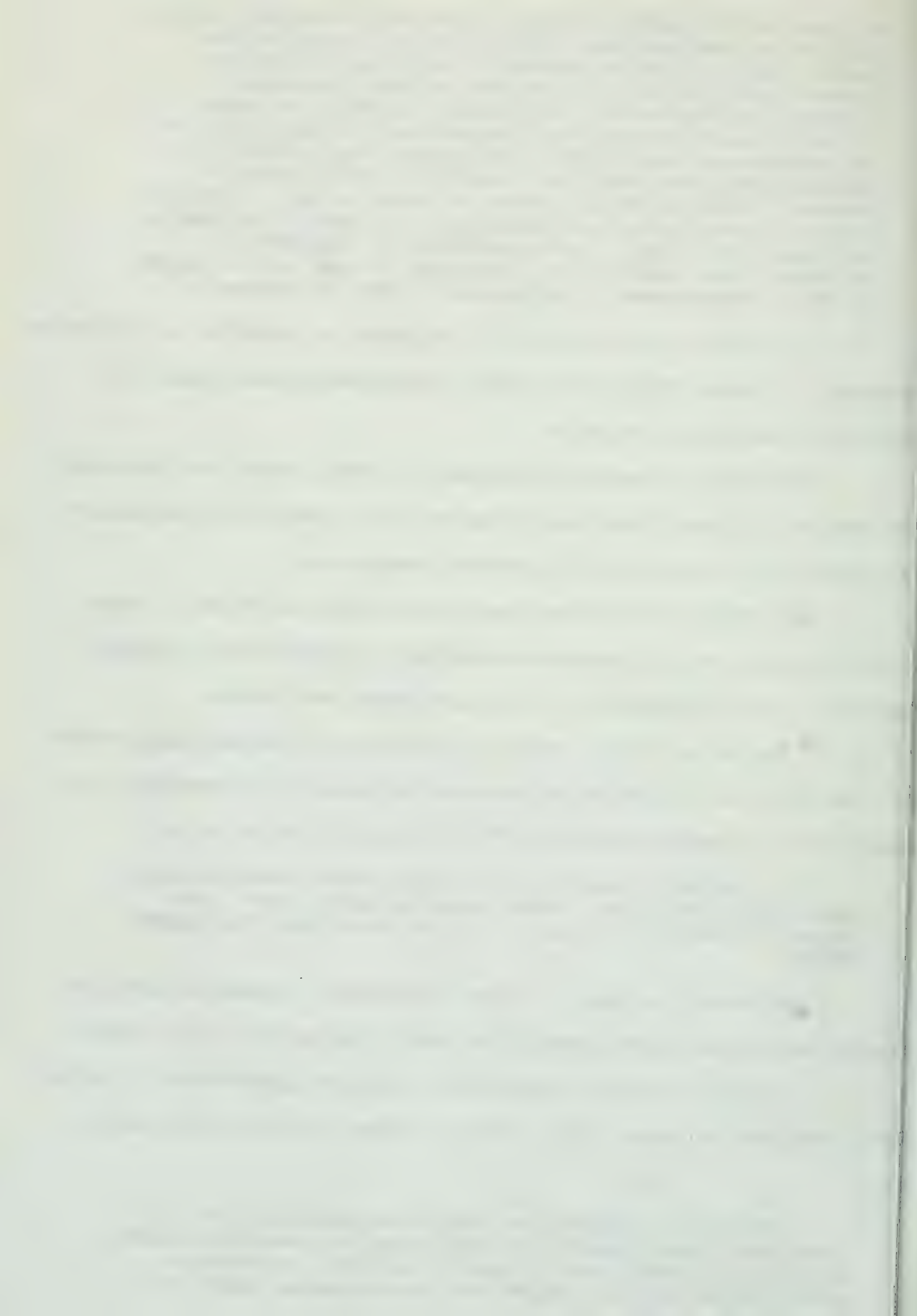
III. The trial court erred in refusing to permit Margarett Karlins (who was called as an adverse witness for appellant) to answer the following question (T 310, pages 1 to 4) viz.:

"Q. (By Mr. Shapiro) You heard Heath Edwards state that the first line "'What does business own'" was signed by David Williams. Do you deny that he signed that?"

Reference is made to the objections, comments and discussion contained under Specification of Error No. III (supra).

Appellant called Margarett Karlins (president of defendant) pursuant to Rule 43(b) Federal Rules of Civil Procedure, viz.:

"Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a



public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

Under the above rule appellant had the right to interrogate Margarette Karlins on any relevant matter in issue. The handwriting on Exhibit A was in issue. Heath Edwards, handwriting expert for appellant had testified that the portion of Exhibit A viz.: "What does the business own?" was in the handwriting of David Williams (T 285, lines 3 to 13). This was a very vital question going to the very foundation of appellee's defense and it was error for the court to refuse to allow Mrs. Karlins to answer.

Lawless v. Calaway, 24 C (2d) 81, 147 P 2d 604 held that the exclusion of expert testimony of an adverse witness was error under Section 2055 California Code of Civil Procedure (a statute similar to Rule 43(b) Federal Rules of Civil Procedure). The court stated:

"[I] Statutes such as section 2055 were enacted to enable a party to call his adversary and elicit his testimony without making him his own witness. (Smellie v. Southern Pacific Co., 212 Cal. 540, 556 [299 P. 529]; Waller v. Sloan, 225 Mich. 600 [196 N.W. 347, 348]; Langford v. Issenhuth, 28 S.D. 451 [134 N.W. 889, 892].) They are remedial in character and should be liberally construed in order to accomplish their purpose. (Smellie v. Southern Pacific Co., supra.) Any relevant matter in issue in a case is within the scope of the examination of witnesses called pursuant to the provisions of such statutes. (Langford v. Issenhuth, supra; Waller v. Sloan, supra; Pfefferkorn v. Seefield, 66 Minn. 223 [68 N.W. 1072, 1073]; cf. Cioli v Kenourgios, 59 Cal. App. 690, 697 [211 P. 838]; Good v. Brown, 51 Cal. App. 199, 201 [196 P. 299].) The opinion in Langford v. Issenhuth, supra, states: "'It is said that the widest and freest scope is to be given the examination. . . . The whole case may be fully and minutely investigated. . . It appears to us the main purpose of the statute is to permit an adverse party to be called as a witness to

prove or to be interrogated concerning facts material to the case of the party calling him, and that such a witness may be called to prove a single material fact, or a number of material facts, even the whole case. The facts as to which the party calling such witness may desire to examine him are wholly within his discretion.'"

Also see Daggett v. Atchison T & S.F.R. Co., 48 C 2d 55, 313 P 2d 557, 64 ALR 2d 1283; MacGregor v. Kawaoka, 132 C 2d 407, 282 P 2d 130.

IV. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 309, lines 9 and 10), viz.:

"Q. (By Mr. Shapiro) You heard Mr. Edwards' testimony as to who wrote this memorandum. Do you still state that Mr. Weire--"

The objections, comments, discussions and excerpts from the record contained under Specification of Error IV above are a part hereof.

Reference is made to the objections, comments, arguments and authorities contained under Argument, Specification of Error III next above.

In view of the testimony of appellant's handwriting expert, Nath Edwards, that the upper half of Exhibit A was not in the handwriting of David Weire (T 282, lines 11 to 26; T 283, lines 1 to 10) it was error for the court to refuse to allow Margarette Karlins to answer the question.

V. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 304, lines 1, 2, 5, 6, 7), viz.:

"Q. (By Mr. Shapiro) Mrs. Karlins, I will ask you to look at Defendant's Exhibit A."

"Q. (By Mr. Shapiro) Now you state that that contains the agreement between you and Mr. Weire



concerning the sale of the stock in Swank Shop (Guam), Inc., is that right?"

Comments and objections set out under Specification of Error No. V are made a part hereof. Also made a part hereof are the objections, comments, arguments and authorities contained under Argument, Specification of Error No. III.

It is urged that the witness Margarette Karlins should have answered the question and it was not up to the court to volunteer the answers.

VI. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 306, line 19) viz.:

"Q. (By Mr. Shapiro) Now how did you arrive at that \$22,000.00?"

The objections, comments and excerpts from the record contained under Specification of Error No. VI are made a part hereof. Also made a part hereof are the objections, comments, arguments and authorities contained under Argument, Specification of Error No. I.

The court refused to allow Margarette Karlins to answer this question on the ground that appellant's attorney had previously cross-examined on said question. A reading of the transcript of appellant's cross-examination of Margarette Karlins reveals that this question was never propounded to the said Margarette Karlins appellant's attorney (T 212, line 21 to T 248, line 1).

In view of the fact that Margarette Karlins changed her testimony concerning the amount of inventory upon prompting from the trial court, (see Specification of Error No. VIII above) it was particularly vital that she be examined on this matter. Appellant urges that Margarette Karlins would not have been able to itemize

the amounts making up the \$22,000.00. At any rate this was a proper question on a relevant issue and should have been answered. The refusal to allow Margarett Karlins to answer is urged as error.

VII. The trial court erred in refusing to permit Margarett Karlins (who was called as an adverse witness for appellant) to answer the following question (T 308, lines 4 to 7), viz.:

"Q. (By Mr. Shapiro) Mrs. Karlins, will you please itemize the amounts making up the \$22,000 which you paid to, which you and your husband paid to Mr. Weire for the purchase price of the stock in Guam Swank Shop, Inc.?"

Comments and objections set out under Specification of Error No. VII are made a part hereof. Also made a part hereof are the objections, comments, arguments and authorities contained under Argument Specification of Error No. III.

This is a companion question to that set out in Argument, Specification of Error No. VI next above and everything stated herein is incorporated herein.

VIII. The trial court erred in taking over the examination of Margarett Karlins and by asking leading questions and referring to exhibits in evidence causing her to change her testimony as to the amount of inventory at the time of the sale (T 207 lines 13 to 16; T 208; T 209 lines 1 to 20, as follows).

Excerpts from the record set out under Specification of Error No. VIII above are made a part hereof.

A trial judge has no more right to propound improper questions to a witness than a party calling said witnesses. He is not authorized to propound leading questions (or refer to exhibits in evidence) which would tend to change the testimony of a witness. A trial judge must be impartial and is not permitted to become an



"... He should be temperate and courteous in his attitude toward counsel, should not show undue impatience or severity towards either, should exercise a high degree of patience and forbearance with counsel and witnesses, should maintain judicial poise throughout the trial and should have an open and unprejudiced mind. He must not show partiality towards any one side, and he should not judge the issues before all the evidence is presented..."

53 Am. Jur. 74, Section 74: "...Upon the trial judge rests the responsibility of striving for an atmosphere of impartiality. His conduct in trying a case must be fair to both sides... Since the judge's duties are of a judicial nature, he should not act as counsel for a party by raising objections which the party should make..."

53 Am. Jur. 76, Section 75: "...But he should not usurp the functions of counsel by prescribing the order of calling witnesses or interfering with the general conduct of the case by the attorneys, or by examining witnesses to the exclusion of counsel. Nor should the judge by a dissertation addressed to a witness endeavor to get him to change his testimony."

In *People v. Giacomino*, 347 Ill. 523, 180 N.E. 437, 84 A.L.R. 1168, the court stated:

"...Nevertheless, the principal enunciated in the former case is not to be ignored even when a jury has been waived. In either event it is the duty of the judge to arrive at his conclusions from a calm, unbiased consideration of the facts. He should neither be prosecutor nor defender. While he is a searcher for the truth, it is not his duty to discomfit and confuse witnesses by his questions or attitude. The extent to which a judge may indulge in the examination of witnesses largely rests in his discretion, but in the exercise of such discretion he must not forget the function of a judge and assume that of an advocate..."

"In *King v. Com.* (1920) 187 Ky. 782, 220 S.W. 755, it was said that the trial judge "'has no more right than counsel to ask irrelevant or incompetent questions, nor should he, by the questions that he does ask, or in his manner of propounding them, indicate that he has any bias or prejudice one way or the other.'"

It was particularly important that Margarett Karlines testify truthfully as to the figures contained on Exhibit A. As



her testimony was first given and positively affirmed by her, the amount paid by her and her husband was \$17,500.00, itemized as follows:

Auto	\$ 1,500.00
Inventory	9,000.00
Cash	2,000.00
F.F.&E	5,000.00
Total	<u>\$ 17,500.00</u>

Such testimony was inconsistent with the purchase price of \$22,000.00 paid for the stock and had to fall flat unless changed. It was necessary, therefore, that she testify that the inventory was \$14,000.00 instead of \$9,000.00 which would have brought the total up to \$22,500.00, still \$500.00 off. The court by leading questions and reference to exhibits finally led her to change her testimony to the amount of inventory as \$14,000.00. These questions would certainly have been improper if propounded by counsel for appellee - they were all the more improper when propounded by the court whose duty it was to arrive at the truth and to act as an impartial referee, safeguarding the rights of appellant as well as appellee. It is further urged that testimony that the inventory was \$14,000.00 contradicts the statement that the inventory was 9,000.00 contained on Exhibit A and is contrary to the parol evidence rule.

IX. The trial court erred in refusing to receive in evidence Exhibit 24 for identification and in further refusing to permit appellant's attorney to make a showing for the record as to the contents of said Exhibit 24 for identification (T 314, lines 24 to 6; T 315; T 316, lines 1 to 11).

Excerpts from the record set out under Specification of Error No. IX above are made a part hereof.

It is fundamental that the party whose evidence is rejected



be permitted to make a showing for the record so as to permit him to bring the matter properly before the appellate court. It might be held by the appellate court that the exhibit was properly rejected. On the other hand appellant had a right to have the appellate court pass on that question and his right to make a showing for the record was error.

Heath Edwards had testified that he saw Exhibit A while he was working at Bank of Hawaii. Exhibit 24 would have corroborated his testimony that negotiations were taking place there. The letter could have further been tied in with David Weire's testimony to show that the memorandum Exhibit A was written up far before the date of the sale. The evidence contained in said exhibit was relevant, competent, and material - said exhibit should have been received in evidence.

X. The trial court erred in receiving evidence of Margarette Karlins (T 199, line 6 to T 212, line 12), which contradicted the written agreement between David Weire and Margarette Karlins and Elliott Karlins (Exhibit 7).

20 Am. Jur. 958, 962, 963, Section 1099: "It is a general principle that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing; in other words, the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent. This rule is especially applicable to contracts under seal. The legal effect and operation of the writing cannot be controlled by parol evidence. The theory that proof of prior and contemporaneous negotiations and representations, though not admissible to vary the terms or legal effect of the written contract, may be received for the purpose of raising an estoppel in pais

is a mere evasion of the statutory rule which protects written contracts from impeachment by loose collateral evidence and, upon principle and authority, is not tenable... The reason of the rule is that as the parties have constituted the writing to be the only outward visible expression of their meaning, no other words are to be added to it or substituted in its stead. The writing still remains the best evidence of the understanding of the parties, even though, through defect of form or by reason of some positive provision of law, it cannot have the effect intended for it... Except for the purpose of having a contract reformed, a party to a written agreement may not assert its validity and at the same time deny that the writing embodies the actual contractual rights and obligations which the parties intended to make..."

"Sec. 1100. Rule as One of Substantive Law. The rule which denies effect to an oral agreement which contradicts a written contract entered into at the same time or later is not one merely of evidence, but is one of positive or substantive law founded upon the substantive rights of the parties."

Appellant urges that the alleged oral agreement contradicting the terms of Exhibit 7 was improperly received, as contrary to the parol evidence rule. It clearly appears from the testimony of Margarett Karlins that she was in possession of the books of appellee (T 215, lines 2 to 26) several weeks before the agreement of sale of the stock (Exhibit 7) was executed. The books and records in possession of Mrs. Karlins for several weeks before the sale (Exhibit 7) showed as of January 31, 1963 under Bills Payable - Bank of America (Drawn by Regency Creations, Ltd.)

Invoice 643/2/219	2,880.56
Invoice 665/2/222	5,439.27

and under Other Accounts Payable

Regency Manufacturing Co. (Ltd.) Disbursements A/C	\$1,475.88
---	------------

See Exhibit 1.

Since January 31, 1963 Bill of Exchange for \$1,985.37 was accepted on March 27, 1963 and the Regency Manufacturing Co. account was increased to \$5,179.25. This latter bill of exchange and items



purchased from Regency Manufacturing Company since January 31, 1963 were evidently not entered on appellee's books. However the first three items, listed, viz.: \$2,880.56, \$5,439.27 and \$1,475.88 were and are at present actually listed as debts of appellee. These books and records were in possession of Margarette Karlins several weeks prior to the said sale (Exhibit 7) and Margarette Karlins certainly knew (or should have known) of the existence of these debts at the time of said sale.

It also appears that Margarette Karlins explained the agreement of the parties to Mr. Gayle, her attorney (T 206, lines 25 and 26; T 207, line 1) who made notes of the transaction (Exhibit F). Said notes (Exhibit F) make no mention of any assumption of debts and shows purely and simply a stock sales transaction. The evidence of Margarette Karlins therefore as to Exhibit A is not competent evidence. There was no fraud upon which she was justified in relying, since she knew of the existence of the three items mentioned above. Knowing of these items it was incumbent upon her to have required the release of same - the only conclusion for her failure to do so is that there was no intent to release same.

XI. The trial court was biased and prejudiced against appellant.

The excerpts from the record under Specification of Error No. XI are made a part hereof.

Attention is also called to excerpts from the record under Specification of Errors Nos. III to X inclusive.

The authorities contained under Argument, Specification of Error No. VIII are made a part hereof.

From the very beginning it appears that the trial court pre-judged the case and decided that David Weire was the "alter



ego" of plaintiff (T 2, lines 22 to 24; T 3, lines 8 to 14; T 7, lines 21 to 26; T 8, lines 12 to 15; T 9, lines 4 to 9. It is noted that all these remarks were made before any trial in this case and such remarks indicate that the trial court had already decided against appellant. The court it appears made up its mind on that issue without receiving any evidence in this case. The basis for his finding was his opinion derived from trying a previous case of Regency Manufacturing Company vs. appellee (which was decided in favor of Regency Manufacturing Co., subject to a set-off for commissions) - the record of that case was not submitted in evidence - therefore the trial court cannot consider the evidence contained therein.

20 Am. Jur. 105, Section 87: "In the trial of a case before it, a court ordinarily will not, upon either its own motion or suggestion of counsel, take judicial notice of the records, judgments, and orders in other and different cases or proceedings, even though such cases or proceedings may be between the same parties and in relation to the same subject matter. In other words, a court, in deciding one case, will not take judicial notice of what may appear from its own records in another and distinct case, unless made part of the case under consideration by the formal introduction of such records into evidence..."

Appellant admits that virtually all of the stock of appellant was and is owned by David Weire; as to Regency Manufacturing Company, however, the evidence is uncontradicted that David Weire is a minority stockholder and has and had no control over the said Regency Manufacturing Company - he therefore, could not be the "alter ego" of that corporation. Actually there is no competent evidence in this case that Margarette Karlins dealt with David Weire as if he were in fact the appellant or Regency Manufacturing Company. The trial courts finding (without competent evidence to sustain it) was simply taken for granted and no proof was offered

Bias and prejudice is shown in the court's partiality to appellee in the granting of 4 extensions of time to answer from July 27, 1965 (when appellees answer was due) to December 1, 1965. R, page 6; R, page 15; R, page 18; R, page 34, a period of over 4 months and refusing to continue hearing on appellant's behalf for 7 days (T 14 lines 11 to 26; T 15 lines 1 to 11). The court stated (T 24 to 26):

"The Court: This court is not set up for the purpose of accommodating Mr. Weire or any other litigant."

The court required taking of discovery depositions of David Weire precedent to the taking of appellant's depositions (T 4, lines 13 to 15; T 5, lines 21 to 26; T 6; T 7, lines 1 to 6. Said discovery depositions were taken in Hong Kong November 9, 1965 R, page 16) by appellee. The deposition of David Weire was taken on November 16, 1965 (R, 33) for the purpose of using same at the trial of this action. Notwithstanding that appellee had taken David Weire's discovery deposition in Hong Kong and further notwithstanding that appellee's attorney cross-examined David Weire at the taking of his deposition in chief, the court on its own motion ordered that David Weire make himself available to testify in this court at the time of trial as a condition precedent to the presentation of appellants case - no tendering of charges was made (R, page 54). David Weire did attend, as appears from the record in this case; however, the action of the trial judge, under the circumstances, indicated his bias and prejudice. It is submitted that it was improper to require Mr. Weire's presence at the trial on the court's own motion without tendering charges - the courts refusal to grant a 7 day continuance upon representation

of appellants counsel to the trial judge that Mr. Weire's deposition would be used was likewise an indication of bias and prejudice. Mr. Weire had business commitments which he had to cancel and suffered an extreme hardship by the trial court's arbitrary refusal to allow Mr. Weire to come 7 days later. The undersigned represents that the case would not have been prejudiced by the granting of the reasonable request for a short extension. Contrast on the other hand the treatment of appellee as shown above who was given an extension of more than 3 months to answer. Does this indicate impartiality on the trial judge's part? In addition to the above it is urged that the trial judge indicated his bias and prejudice as set out in Specifications of Errors Nos. I to X, inclusive.

The authorities appearing under Argument Specification of Error No. X are made a part hereof.

XII. Appellant was denied a fair trial.

This is a companion specification to Specification of Error No. XI. The entire Specification No. XI and all arguments excerpts and matters set out thereunder are made a part hereof.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment appealed from should be reversed.

Dated November 30, 1966

Respectfully submitted,
David M. Shapiro
DAVID M. SHAPIRO
Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

David M. Shapiro
DAVID M. SHAPIRO
Attorney for Appellant

NO. 21017 ✓

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDDIE W. PEMBROOK,)
)
Petitioner-Appellant,)
)
vs.)
)
LAWRENCE E. WILSON, Warden,)
)
California State Prison,)
)
San Quentin, California,)
)
Respondent-Appellee.)
_____)

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California
ROBERT R. GRANUCCI
Deputy Attorney General
JAMES A. AIELLO
Deputy Attorney General

FILED

SEP 1 1966

WM F. CLARK, CLERK

6000 State Building
San Francisco, California 94102
Telephone: 557-3259

Attorneys for Appellee

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San Quentin, California,)	
)	
Respondent-Appellee.)	
)	

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, United States Code sections 2241, 2242, and 2243. The jurisdiction of this Court is conferred by Titled 28, United States Code section 2253, which makes a final order^{1/} in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United

1. For a discussion as to whether an order such as is herein appealed from is final and appealable, see Application of Hodge, 248 F.2d 843, 844 (9th Cir. 1957).

States District Court for the Northern District of California, Southern Division, denying his motion seeking permission to file his application for a writ of habeas corpus in forma pauperis.

A. Proceedings in the State Courts

On December 2, 1960, appellant was found guilty of a violation of California Penal Code section 192, manslaughter, a felony (AOB 2). He was subsequently sentenced to serve the term prescribed by law. There was no appeal.

Appellant caused applications for the writ of habeas corpus to be filed in the Superior Court for the County of Marin on November 24, 1965, (TR²/23-25) and in the California Supreme Court on December 10, 1965, both of which were denied without comment (AOB 2).

B. Proceedings in the Federal Courts

On March 2, 1966, appellant filed a motion seeking permission to file an application for a writ of habeas corpus in forma pauperis in the United States District Court for the Northern District of California, Southern Division (TR 10). The Honorable Lloyd H. Burke denied the motion on March 9, 1966. In that order, the following recital was noted: "The proposed petition raises the Escobedo issue. Escobedo v. Illinois does not operate retroactively to effect convictions

2. "TR" refers to the Transcript of Record of the proceedings in the District Court.

final before that decision. Carrizosa v. Wilson, 244 F.Supp. 120 (D.C. Cal. 1965)." (TR 27).

On April 25, 1966, Judge Burke granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis (TR 35).

On May 6, 1966, notice of appeal was filed by appellant.

APPELLANT'S CONTENTIONS

On this appeal appellant contends (1) that the mere fact that Carrizosa v. Wilson prevents collateral attack on convictions final prior to Escobedo v. Illinois, does not curtail appellant's reliance upon other decisions in this area, (2) to refuse appellant in view of Carrizosa v. Wilson, where appellant's incriminating statement is the sole basis for his conviction, is to deny him equal protection of the law where prior decisions rendered by Federal Courts substantiate appellant's claim of a constitutional violation.

SUMMARY OF APPELLEE'S ARGUMENT

The denial of appellant's motion seeking permission to file an application for a writ of habeas corpus in forma pauperis, an act within the discretion of the District Court, was manifestly correct in view of the frivolous nature of the contentions raised in the petition.

/

/

ARGUMENT

Appellant treats the denial of his motion seeking permission to file an application for a writ of habeas corpus in forma pauperis as the denial of his application for a writ of habeas corpus, and he argues extensively the merits of his petition. However, the sole issue on this appeal is the correctness of the District Court's denial of his motion seeking permission to file in forma pauperis, as the merits of the petition were not reached. Anderson v. Heinze, 258 F.2d 479, 483 (9th Cir. 1958), cert. denied, 358 U.S. 889 (1958).

A motion to proceed in forma pauperis on an application in the District Court by a state prisoner for a writ of habeas corpus is to be granted unless the issues presented are plainly frivolous. In making that determination, the District Court examines the papers before it. If it finds that the application has no merit, and would be denied without a hearing in the event of a nonindigent application, a motion to proceed in forma pauperis is to be denied. If the reason for the denial is supported by the record, it will be affirmed on appeal. Anderson v. Heinze, supra, p. 483.

The reason given by the District Court in the instant case was:

"The proposed petition raises the Escobedo issue. Escobedo v. Illinois does not operate

retroactively to effect convictions final before that decision. Carrizosa v. Wilson, 244 F.Supp. 120 (D.C. Cal. 1965)." (TR 27).

Our sole inquiry on this appeal, then, is whether the papers on file in this case support the denial on this basis.

Anderson v. Heinze, supra, 483.

The grounds upon which appellant based his allegation that he was being held in custody unlawfully are the following:

"(a) Petitioner was held incommunicado for almost three days, and denial of counsel at interrogation.

"(b) Unnecessary delay in being taken before a Magistrate (over 80 hours) and ineffective aid of counsel and failure of State Official's to advise petitioner of his Constitutional Right's to remain silent and his right to counsel.

"(c) Lost of jurisdiction in the examining court and psychological coercion, by withholding the nature of the charge until after petitioner gave a statement." (sic) (Petition, pp 3-4, TR 3-4).

In his argument, (Petition, pp. 9-12, TR 18-21), appellant focused on the Escobedo aspects of his grounds (a) (b) and (c), and asserted with particular emphasis that a confession obtained in violation of Escobedo had been

introduced at his trial (Petition, p. 10, TR 19). Clearly, then, the District Court's denial of the motion was correct. Johnson v. New Jersey, 34 U.S.L. Week 4592 (1966).

Of course, delay in taking before a magistrate, i.e., delay in arraignment, does not present a federal question, Anderson v. Heinze, supra, p. 484, and see fn. 9(2), and, the allegation of ineffective aid of counsel, based, as it is, upon the fact that counsel allowed the confession to go into evidence (Petition, p. 4, TR 4), must fall with its basis, the Escobedo argument. Appellant also made a passing charge that the statement he gave to the police was coerced (Petition, p. 4, ground (c), TR 4). The coercion consisted of the fact that he was held "incommunicado" for "almost" three days, and the police officers did not tell appellant that his wife was dead until after he had given his statement (Petition, pp. 3, 4, TR 3-4).

In his brief on appeal, appellant strays from his Escobedo argument, and places emphasis on this theory of coercion. Of course, the denial of appellant's motion on grounds that Escobedo does not apply retroactively does not prejudice appellant's right to assert on habeas corpus that his confession was coerced, Davis v. North Carolina, 34 U.S.L. Week 4597 (1966). However, for purposes of the instant application, it is clear that the factual allegations in this regard are only conclusionary, and thus

insufficient to predicate a reversal of the District Court's decision. Schlette v. California, 284 F.2d 827, 833-34 (9th Cir. 1960).

The mere fact that appellant was held incommunicado for "almost" three days (Petition, p. 3, TR 3, AOB 9), or that the interrogating officers would not tell appellant that his wife was dead until he made a statement (Petition, p. 4, TR 4, AOB 12-13) are merely factors which might indicate an involuntary statement. Davis v. North Carolina, supra, p. 4598. It is noteworthy that appellant does not explain how the asserted actions of the police caused him to make a statement. He merely states that it was "induced by psychological coercion" (AOB 13). Clearly this allegation does not fulfill the particularity requirement which is a prerequisite for the relief appellant seeks. Schlette v. California, supra.

Furthermore, since this issue was raised in appellant's initial petition, presumably the District Court considered it in denying appellant's petition, and as the record supports that denial, the decision must be affirmed on this appeal. Anderson v. Heinze, supra.

Notwithstanding the above, the District Court's decision was correct for another reason, which also appears on the face of the petition, i.e., that appellant has deliberately by-passed available state remedies. Neither

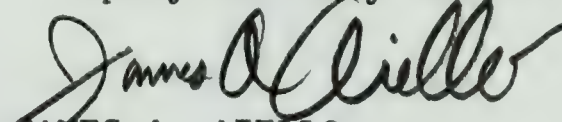
appellant nor his trial counsel raised the coercion issue at trial. Appellant did not appeal his conviction, even though he could have raised the coercion issue on appeal for the first time. People v. Rand, 202 Cal.App.2d 668 (1962). He did not ask for leave to file late notice of appeal, as is provided for under California Rules of Court, Rule 31(a), People v. Curry, 62 Cal.2d 207 (1965), and he did not ask for a hearing in the California Supreme Court. In re Notz, 62 Cal.2d 423 (1965). Clearly appellant by-passed presently available state remedies, and was therefore not entitled to file his application. Nelson v. California, 346 F.2d 73, 77-80 (9th Cir. 1965).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's motion seeking permission to file an application for a writ of habeas corpus in forma pauperis should be affirmed.

DATED: August 31, 1966.

THOMAS C. LYNCH, Attorney General
of the State of California
ROBERT R. GRANUCCI
Deputy Attorney General


JAMES A. AIELLO
Deputy Attorney General

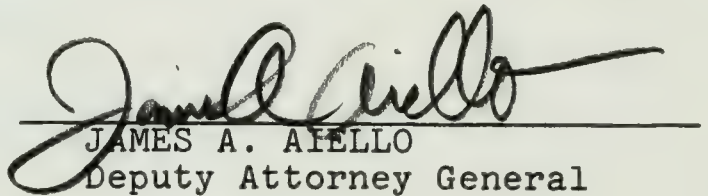
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Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: August 31, 1966.


JAMES A. AIELLO
Deputy Attorney General

NO. 21026 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURICE RAYMOND SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney,
SHELBY R. GOTT,
Assistant U.S. Attorney,

325 West "F" Street,
San Diego, California 92101

Attorneys for Appellee,
United States of America.

FILED

MAR 14 1967

MAR 9 1967

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325 West "F" Street,
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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NO. 21026

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURICE RAYMOND SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in counts one and three of a four-count indictment, following trial by jury (C.T.1-4)^{1/}. The trial judge dismissed counts two and four at the close of the government's case (C.T.7).

^{1/} "C.T." refers to the Clerk's Transcript.

The offenses occurred in the Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in each count of a four-count indictment returned on May 26, 1965, by the Federal Grand Jury for the Southern District of California, Southern Division. The first count alleged that on March 26, 1965, appellant knowingly concealed, and facilitated the transportation and concealment of approximately 6.9 grams of heroin, a narcotic drug, which as he then and there well knew, had been imported and brought into the United States contrary to law (C.T.2).

The third count alleges that on March 28, 1965, appellant knowingly concealed, and facilitated the transportation and concealment of approximately 14.4 grams of heroin, a narcotic drug, which as he then and there well knew, had been imported and brought into the United States contrary to law (C.T.4).

Count two alleged the sale of the same quantity of heroin as charged in count one to Harry Watson on March 26, 1965 (C.T.3). Count four charged the sale of the same quantity of heroin as charged in count three to Antonio Celaya (C.T.5).

Jury trial of appellant commenced on August 4, 1965, as to all four counts before United States District Judge Fred Kunzel. Appellant was found guilty as charged on counts one and three on August 6, 1965 (C.T.9, 10), after judgment of acquittal had been granted as to counts two and four on August 4, 1965 (C.T.7).

Thereafter, on August 27, 1965, appellant was committed to the custody of the Attorney General for a period of 10 years on each of counts one and three to run concurrently (C.T.20).

Appellant filed timely notice of appeal on September 2, 1965 (C.T.21).

On October 4, 1965, the sentence was reduced to seven years on each of counts one and three to run concurrently.

III

ERROR SPECIFIED

Errors as alleged by appellant are para phrased as follows:

- (1) That appellant was wrongfully entrapped into

committing the offenses charged.

- (2) The prosecutor wrongfully showed the Federal Bureau of Investigation record sheet ("rap sheet") to the jury.

IV

STATEMENT OF THE FACTS

Appellant was first contacted by Clifford J. Brooks, a special employee of the Federal Bureau of Narcotics, on March 24, 1965, at the Zebra Club in San Diego. After a few drinks and a short conversation, Brooks asked in an offhand way, "How do you get rich?" And Mr. Shaw said "Smack, man, ^{2/}smack" (R.T.16). According to Brooks, "Smack," is the slang term for heroin (R.T.17).

Brooks asked appellant if he could purchase some "Smack," to which appellant replied that he had a connection in Tijuana named "Manuel," who is an upholsterer. Brooks ordered an ounce of heroin from appellant at a price of \$300.00 for delivery later. Brooks located appellant at the Zebra Club between 11:00 P.M. and midnight the following day (March 25) after he was searched by narcotics agents and they had provided him the sum

^{2/} "R.T." Refers to the Reporter's Transcript.

of \$300.00 (R.T.17-19).

Shaw said , "It would take a little while for him to get the heroin," (R.T.18). They proceeded to the Cross Roads bar at Fourth and Market (R.T.20).

Appellant asked Brooks if he was ready to deal. They went to the men's restroom upon Shaw's instructions where Brooks paid \$290.00 to Shaw for the heroin, Agent Watson was watching the proceedings from 7 to 8 feet away and on the way to the restroom, appellant and Brooks passed close enough that Brooks pulled the sleeve of Watson's coat. Brooks turned the heroin and the remaining \$10.00 of the money over to the agents and was searched again (R.T. 21,22,71).

The second sale took place on March 28, 1965. Brooks was again searched and provided with \$600.00 government funds (R. T. 27, 56) and he then proceeded to the Zebra Lounge and met appellant again. Appellant asked if Brooks was ready to go again (R.T.28). Appellant was seated between Brooks and Agent Celaya, Brooks told appellant a joke and appellant slapped Agent Celaya on the back and said "Now that"s a pretty good joke, wasn't it". (R.T.28,81).

Appellant borrowed 10¢ from Brooks' change on the bar to

phone his "connection" (R.T.28-29). Agent Celaya overheard a part of the conversation (R.T.81). Appellant returned after phoning his connection and asked Brooks if he was ready to go. They left the Zebra Club and went to Archie's. After about five minutes at Archie's, appellant invited Brooks outside and they proceeded together to an alcove, where appellant produced Exhibit 2 consisting of two containers of heroin. Brooks then paid appellant \$570.00. Brooks turned Exhibit 2 and \$30.00 over to the agents and was again searched with negative results (R.T. 30-31).

Both sales were under surveillance by officers (R.T. 54-66, 70-71, 75-79, 81-83, 90-06, 81, 82, 97, 100).

On the second sale, Agent Heisig saw a meeting of hands of appellant and Brooks and saw something white transferred from the hand of appellant to Brooks (R.T. 63).

As to the same transaction, Agent Celaya saw Shaw place his right hand into his right coat pocket. Mr. Brooks extended his right hand. There appeared to be a meeting of the hands (R.T.83).

Brooks worked for the U. S. Post Office and has been a

special employee of the Federal Bureau of Narcotics for 12 years (R.T. 14,36,53).

V

ARGUMENT

A. APPELLANT WAS NOT WRONGFULLY ENTRAPPED INTO COMMITTING THE OFFENSES CHARGED IN COUNTS ONE AND THREE OF THE INDICTMENT.

In the case of Sorrells v. United States, 287 U.S. 435, the Court said at page 451 that predisposition and criminal design are relevant.

In United States v. Becker, 62 F.2d 1007,1008,(2nd Cir. 1933) it was said there are three excuses for inducement,

- (1) An existing course of similar conduct
- (2) The accused's already formed design to commit the crime or similar crime
- (3) His willingness to do so, as evinced by ready compliance.

There is certainly sufficient evidence in this case for the jury to find that the last two existed as to appellant.

In a short period of time after meeting Brooks and in answer

to Brooks question, "How do you get rich?", appellant answered, "Smack, man, smack." (R.T. 16).

He had delivered heroin in exchange for money about a day later on March 26, 1965 with no further contacts by Brooks (R.T. 21).

Then a second sale was made only two days later on March 28, 1965 (R.T. 25, 31).

There need not be evidence submitted to the jury that agents had knowledge of illegal selling before they approached one whom they suspected of it.

Sherman v. United States, 200 F.2d 880 (2nd Cir. 1954)

Hadley v. United States, 18 F.2d 507 (8th Cir. 1927)

This would amount to giving the narcotic peddler "one free shot," before he could be convicted. See Young v. United States, 286 F.2d 13 at 15 (2nd Cir. 1960). Assuming entrapment on the first transaction on March 26, 1965, it would appear there could be no entrapment on the second one on March 28, 1965.

The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government.

Glasser v. United States, 315 U. S. 60, 80 (1942)

Sherman v. United States, 241 F.2d 329 (9th Cir. 1957)

Appellant was impeached

- (1) By his prior felony convictions (R.T. 119).
- (2) By his denial of knowing, or having met Brooks; his being clearly impeached by all the officers' testimony (R.T. 116) and Robert Pleasant, the bartender, at the Zebra Club (R.T. 121-126).
- (3) By his claim of having no money (R.T. 106) but later admitting having \$177.00 on his person on December 12, 1965 (R.T. 119).

The defense of entrapment may not be raised for the first time on appeal.

Ramirez v. United States, 294 F.2d 277 (9th Cir. 1960)

Grant v. United States, 291 F.2d 746 (9th Cir. 1961), cert. denied, 368 U.S. 999 (1962).

In Cellino v. United States, 276 F.2d 941 (9th Cir. 1960), the appellant and his attorney were told that the judge knew they did not want an instruction on entrapment and no exception was taken, the issue could not be raised on appeal.

In the instant case, the judge made a similar remark with no objection or comments (R.T. 171).

In the case of Bloch v. United States (9th Cir. 1955) , 226 F.2d 189 , it was said "the defense of entrapment is not available to one standing ready to commit the offense given an opportunity," and that "an instruction on entrapment was perhaps unnecessary."

The appellant's defense is apparently "mistaken identity" since he wasn't arrested at the scene. He denies any knowledge of the transactions involved (R.T. 104).

The defense of entrapment is unavailable to one who denies committing the acts necessary to constitute the offense charged,

Ortiz v. United States 358 F.2d 107 (9th Cir. 1966)

Ortega v. United States 348 F.2d 874 (9th Cir. 1965)

Ramirez v. United States 294 F.2d 277 (9th Cir. 1961)

B. THERE WAS NO MISCONDUCT BY COUNSEL FOR THE
GOVERNMENT.

Appellant contends that counsel for the government showed the Federal Bureau of Investigation record sheet to the jury.

Judge Kunzel presiding over the trial by jury stated, "I didn't observe it and I doubt whether any of the jurors know what a rap sheet is or have ever seen one. I doubt it, and I

don't think that the jurors could see what Mr. Gott (Asst. U.S. Attorney) was looking at." (R.T.172)

Assuming some member of the jury saw the "rap sheet," and recognized it, it would be difficult to imagine any harmful prejudice to appellant who admits serving five penitentiary sentences (R.T.119).

If substantial prejudice does not appear, the error must be regarded as harmless. Berger v. United States, 298 U.S.78 (1935).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney,

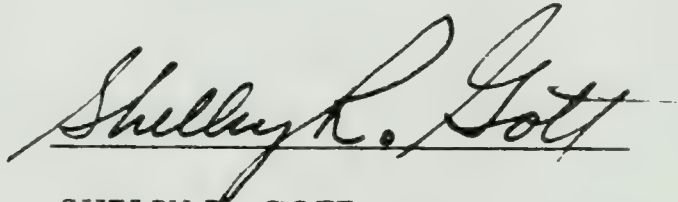
SHELBY R. GOTT,
Assistant U. S. Attorney.

Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in cursive script, reading "Shelby R. Gott", written over a horizontal line.

SHELBY R. GOTT,
Assistant United States Attorney

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOM JOHNSON, INC., RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

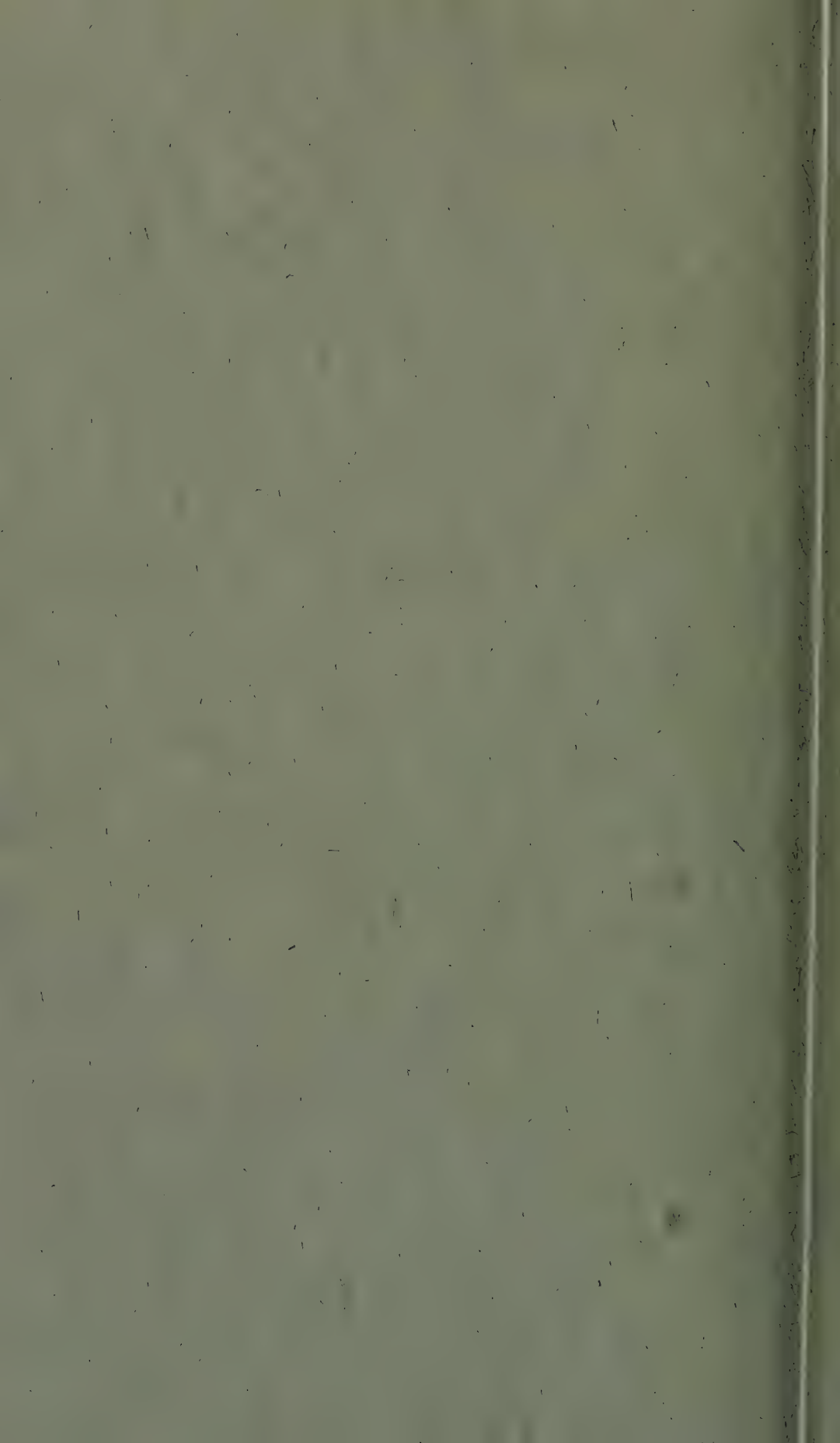
**WARREN M. DAVISON,
HAROLD B. SHORE,**
Attorneys,

National Labor Relations Board.

FILED

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WM. B. LUCK, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,027

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOM JOHNSON, INC., RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued against respondent on October 20, 1965. The Board's Decision and Order (R. 38-46)¹ are reported at 154

¹ References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume 1, pleadings" are designated "R." References to portions of the stenographic transcript reproduced pursuant to rules 10 and 17 of this Court are designated "Tr." "GC Exh." refers to exhibits of the General Counsel; "R. Exh." refers to respondent's exhibits. Whenever, in a series of references, a semicolon appears,

NLRB 1352. This Court has jurisdiction, the unfair labor practices having occurred at Stateline, Nevada, within this judicial circuit. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondent violated Sections 8(a)(1) and (5) of the Act by bargaining directly with certain of its employees, by unilaterally changing their rates of overtime pay without consulting with the Union² at a time when the Union was the representative of the employees in an appropriate bargaining unit, and at the same time threatening employees with the loss of overtime employment. In addition, the Board found that respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Will Hoskins and Niilo Utra because they engaged in protected concerted activities. The facts upon which the Board based its findings are summarized below.

A. *Background; the Company's unilateral changes in overtime pay*

The Company is a Nevada corporation with its principal office at Reno, Nevada, where it is engaged in business as a painting contractor (R. 14). In March 1961, the Company contracted with Harvey's

references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

² Painters Union Local No. 567, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO.

Wagon Wheel, Incorporated, to perform all the interior and exterior painting, paperhanging, and sheet-rock taping³ at the newly constructed Wagon Wheel Hotel in Stateline, Nevada. The contract was of the cost plus 10 percent type, that is, Wagon Wheel agreed to reimburse the Company for its expenditures for labor and materials and then to add 10 percent of these expenditures as its fee (R. 13; Tr. 65-68).

On July 1, 1962, the Union called a strike against the Company and the other members of the Reno Chapter, Painting and Decoration Contractors of California and Nevada, Inc., a voluntary association of employers engaged in painting-contractor work. The strike ended on August 5, 1962, and a collective bargaining agreement between the parties was adopted effective August 6, 1962. (R. 14, 16, 17; Tr. 38). The collective bargaining agreement provided, *inter alia*, that double time would be paid for weekends and holidays, with certain limited exceptions.⁴

³ Taping involves treating the sheet-rock walls with Perfa tape and cement compound in preparation for painting or paperhanging (Tr. 74).

⁴ The provision of the collective bargaining agreement on overtime reads as follows. (GC 3, Section 2—Overtime p. 16).

A. New commercial work, first 4 hours during each week day—time and a half.

B. After 4 hours of overtime each week day—double time during week.

C. Saturday, Sunday, and holidays, double time except on subsistence jobs, Saturday to be time and one-half.

On December 6, 1962, Duane Johnson, the Company's general manager, conducted a meeting of all the employees, including Foremen Fred Schultz and Bob Cleveland, in the paint shop at quitting time. Johnson informed the employees that he had met with Harvey Gross, owner of the Wagon Wheel, and that the latter had told Johnson that he would no longer pay double time for overtime work. Johnson said that if the painters wanted further overtime work they would have to sign an agreement stating that they would work for time and a half instead of double time. He added that if they refused to sign the agreement, he would hire additional employees and thereby eliminate overtime. Johnson then circulated a statement among the employees, explaining that this statement was an agreement under the terms of which the employees would work for time and a half instead of double time. A number of the employees signed the agreement. Employee Will Hoskins, however, said that he "wouldn't sign the damn thing." Johnson thereupon grabbed the agreement away from Hoskins and said that Hoskins did not have to sign it since he was paid subsistence (*infra*, n. 5) and he received only time and a half for overtime in any event (R. 19, 21-22; Tr. 45-51, 118-122, 118-135, 140-143, 157-162).

B. *The discharge of Niilo Utra*

Utra began working for the Company on August 27, 1963. His first assignment was painting outdoor balconies at the motel at a rate of \$4.10 an hour (R. 17; Tr. 82-84). When Utra received his first

paycheck, he asked his foreman, Fred Shultz, why he had not received subsistence.⁵ Shultz replied that Utra was not entitled to subsistence because he had been hired locally.⁶ After he had been on the job for about 2 months, Utra began to suspect that Wagon Wheel was paying subsistence to the Company for him and other employees and that the Company was keeping the money instead of paying it to them. Utra managed to look at the books kept by Wagon Wheel's timekeeper and learned that Wagon Wheel was in fact paying \$8 subsistence per day for him and that his hourly wage was listed on the Wagon Wheel books at \$4.25 (R. 17; Tr. 85-86).⁷

⁵ The collective bargaining agreement between the Association and the Union provided as follows (GC 3, p. 18) :

Subsistence—any employee working a job sufficiently removed from the Reno-Sparks area so that he is required to live at the job site shall be paid not less than the regular rates of pay, plus Eight Dollars (\$8) per day as subsistence . . .

1. Subsistence shall be paid for all days that the employee is stationed at the job area including Saturdays, Sundays and holidays.
2. The only exception to the subsistence shall be when the employee has established a residence in the subsistence area no less than six (6) weeks prior to the starting date of the job.

Utra is a resident of Palo Alto, California, a city about 200 miles from Stateline, the situs of the job (R. 17).

⁶ Utra had been hired in Bijou, California, approximately 2 miles from the job situs (R. 17).

⁷ Records introduced at the hearing by stipulation indicate that during the period November 29, 1962-April 10, 1963, the Company received \$104,190.76 from Harvey's Wagon Wheel

On the following day, Utra confronted Johnson at the Wagon Wheel and asked him about the subsistence. Johnson answered, "You got me" (R. 17; Tr. 87). Johnson told Utra to figure the amount of subsistence and wages which the Company owed him. The next day Utra told Johnson that he believed the Company owed him \$504 subsistence and \$50 in wages (R. 17; Tr. 87-91). On the following day, Johnson informed Utra that he was not entitled to the subsistence money, that the Company had collected the money by mistake, and that he (Johnson) was going to return this money to the Wagon Wheel. Johnson then asked Utra whether he wanted to work for the Company all winter. Utra replied that he did. Johnson directed Utra to secure a referral slip from the union office in Reno. Utra did as he was told and secured a referral slip from Gene Crumley, the Union's business representative (R. 17, 18; Tr. 94-100). Thereafter, Utra received subsistence pay (R. 18; Tr. 100-101).

Shortly thereafter, Utra complained to Business Representative Crumley about the unpaid subsistence and wages. Crumley stated that Johnson would have to pay the back wages and subsistence claimed by Utra. Utra asked Crumley to assist him in pressing his claim. On January 7, 1963, Utra wrote a letter to the Union's national headquarters in Lafayette, Indiana, stating that he had not yet re-

for employees' wages. However, instead of paying all of this money to its employees, the Company retained approximately \$12,000 for itself, paying only \$92,155.44 total salary expenses during this period (R. 19; Tr. 14-18, 26-27, GCX 4, 6, 7).

ceived the subsistence pay due him and requesting the International's assistance in pressing his claim. On January 9, William H. Rohrberg, the Union's general secretary-treasurer, referred Utra's letter to Gene Crumley for appropriate action (R. 18; GCX 10, 11). On January 24, 1963, Johnson told Utra that he had heard that the latter had pressed his claim for subsistence pay with the International. Johnson told Utra that he believed that Gene Crumley would be afraid to press the claim against Johnson because Johnson had "friends" who would "back him up." Johnson then offered to write Utra a check for the full amount due him if Utra would endorse the check and return it to him. Utra refused. Johnson cursed Gene Crumley and said to Utra, "You had better start digging your grave" (R. 41, 20-21; Tr. 107-109, 110-111).⁸

On the following day, January 25, 1963, Utra was laid off. Duane Johnson, the Company's general manager, testified that he personally laid off Utra "because of lack of work in his particular field," and

⁸ In his testimony, Johnson acknowledged that this conversation had taken place and that he had opened the conversation by referring to Utra's having complained to the International Union concerning the subsistence pay owed him. Johnson also acknowledged that he had offered to repay Utra the money and had subsequently rescinded the offer. However, Johnson denied that he had threatened to fire Utra and stated that Utra had asked him to hold the subsistence money on his behalf so that he (Utra) would not gamble it away (Tr. 171-172). The Trial Examiner specifically discredited Johnson's testimony that Utra had asked him to hold the money for him (R. 21). The Board credited Utra's version of the conversation (R. 41).

that, when he laid Utra off, he told him that "work had slowed down" (Tr. 175-176). Utra's "particular field" was outside painting (R. 41; Tr. 185). Foreman Fred Shultz testified, however, that he, and not Duane Johnson, had laid Utra off, and that the reason for his layoff was poor enameling work. Shultz acknowledged that the enameling had been completed in early or the middle part of January and that he had not mentioned Utra's work in any way when he laid him off (R. 41; Tr. 215-219).

About a month after his layoff, Utra received a check for \$504 from Duane Johnson. On the back of the check was the following notation: "Paid under protest" (GCX 12).

C. The discharge of Will E. Hoskins

Hoskins was hired by Duane Johnson as a painter in June 1962 (R. 18; Tr. 37-39). Hoskins worked as an outside painter until November 1, and was then assigned to staining in the interior of the hotel (Tr. 42).

As noted above, Hoskins attended the December 6, meeting of the employees, at which General Manager Duane Johnson informed them that he would no longer pay double time for overtime work. Johnson insisted that the employees sign an agreement to work overtime at time and a half and threatened to cut off all overtime work if they did not sign the agreement. As noted *supra*, when the agreement was passed to Hoskins, he turned to Duane Johnson and said that he "wouldn't sign the damn thing." Johnson grabbed

the paper away from Hoskins and said that he did not have to sign it (Tr. 48-50).

On the following day, Hoskins telephoned Gene Crumley, the Union's business agent, and told him that Duane Johnson was forcing the employees to work for time and a half, instead of doubletime, as provided in the agreement. Several days later, Crumley visited the job site and informed Johnson that the Union would insist that Johnson abide by the overtime provisions of the collective bargaining agreement (R. 40; Tr. 50-55).

On December 13, Duane Johnson called another meeting of the employees and said that one of his employees "had started a big line of BS." Then, looking directly at Hoskins, Johnson said that one of the employees "had put Crumley on his back," and that if he (Johnson) learned the identity of the employee he would fire him "not because he went to the Union, but he would find other reasons" (R. 40; Tr. 55-57). As Johnson was leaving the meeting, he pointed to Hoskins and said, "I want you to remember that" (R. 40; Tr. 56, 122-123).

On the following day, December 14, Foreman Fred Shultz informed Hoskins that he was being laid off and "it wasn't because of [his] work, but they were laying off everybody that was drawing subsistence (R. 40; Tr. 58). In fact, as the Company's own payroll records clearly show, employees, including painters, who were drawing subsistence pay continued to be employed by respondent as late as April 17, 1963, 4 months after Hoskins' layoff (R. 40; GCX 8, payroll nos. 75 through 91). Shultz had never said any-

thing to Hoskins indicating that he was dissatisfied with Hoskins' work (R. 40; Tr. 61, 232).

Several days after he was laid off, Hoskins returned to the job site, claiming that Duane Johnson owed him about \$70 in back wages and subsistence. After some discussion, Johnson and Hoskins compromised the amount and Johnson gave Hoskins a check for \$46. As he gave Hoskins the check, Johnson said, "Before you go squawking to Crumley, I want you to remember that I paid you \$4.35 an hour which is above union scale" (Tr. 59-61).

II. The Board's Conclusions and Order

On the foregoing facts, the Board, in agreement with the Trial Examiner, found that respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with the employees without consulting with the Union at a time during which the Union was the exclusive representative of the employees, and at the same time threatening the employees with loss of overtime employment. The Board further found that respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Utra and Hoskins because they engaged in protected concerted activities.⁹

The Board's order (R. 43-46) requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the

⁹ The Trial Examiner had concluded that the evidence was insufficient to sustain the allegations that the discharges of Utra and Hoskins violated Section 8(a)(3) and (1) of the Act (R. 24). See *infra*, pp. 20-22.

exercise of their rights guaranteed by Section 7 of the Act. Affirmatively, respondent is required to notify and bargain with the Union with respect to any changes in the rates of overtime pay, or with respect to any other changes in the terms and conditions of employment of its employees, and to make whole any of its employees employed at the Wagon Wheel project between December 1, 1962, and April 1, 1963, for any loss of overtime pay which such employees may have suffered because of respondent's unlawful change in the rates of their overtime pay. Respondent is further required to make whole employees Utra and Hoskins for loss of earnings they may have sustained by virtue of their respective unlawful discharges while employed at the Wagon Wheel project in the period beginning with their respective dates of discharge and ending April 1, 1963. The order also directs respondent to notify employees Hoskins and Utra that they will be considered eligible for preferential hiring at any of respondent's projects if they should choose to apply for employment at any of such projects. Respondent is also required to post the usual notices and to mail copies of such notices to employees Hoskins and Utra.

ARGUMENT

- I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(1) and (5) of the Act by Bargaining Directly With Certain of Its Employees, by Unilaterally Changing Its Employees' Conditions of Employment Without Consulting With the Union at a Time When the Union Was the Authorized Representative of Its Employees and by Threatening Its Employees With Loss of Overtime Employment

The credited testimony¹⁰ shows that on December 6, 1962, shortly after the Union was certified as the collective bargaining representative of respondent's employees, Duane Johnson assembled the employees and informed them that, provisions of the collective bargaining agreement to the contrary not-

¹⁰ Of the 10 or so employees who were present at the December 6, meeting, 5 were called as witnesses by the General Counsel. All 5 of these employees testified in support of the 8(a)(1) and (5) allegations in the Board's complaint against respondent (*supra*, p. 4). In an effort to rebut these allegations, respondent called as witnesses 3 supervisors, including its general manager, Duane Johnson. However, respondent did not call any rank and file employee to testify concerning these allegations. The Examiner stated that portions of Johnson's testimony were "quite implausible" (R. 21) and noted that the discrepancies between what Johnson charged the Wagon Wheel for his employees' salaries and what he paid the employees indicated that Johnson was "guilty of either sharp dealing or unforgivable laxity" (*ibid.*). The Trial Examiner also found that employees Denzer and Davis, whose testimony supported the General Counsel's position, testified "with every indication of accuracy and fairness" (*ibid.*). Accordingly, the Trial Examiner's credibility resolutions on this matter, which were upheld by the Board, are entitled to affirmance by the Court. *N.L.R.B. v. I.L.W.U., Local 10, et al.*, 283 F. 2d 558, 562-563 (C.A. 9).

withstanding, he would no longer pay them double-time for overtime work. Instead of attempting to contact representatives of the Union, which at that time was the employees' statutory bargaining representative, Johnson ordered the employees to sign an "agreement" by which they purported to waive their rights to receive doubletime and to work overtime for time and a half, and warned the employees that if they refused to sign the "agreement" he would eliminate overtime by the device of hiring additional employees. Virtually all of the employees signed the "agreement." Johnson's deliberate bypassing of his employees' statutory representative and his warning to the employees of economic reprisal clearly undermined the authority and position of the Union, abridged his employees' Section 7 rights to "bargain collectively through representatives of their own choosing," and clearly frustrated "the objectives of Section 8(a)(5) much as a flat refusal" to bargain. *N.L.R.B. v. Katz, et al.*, 369 U.S. 736, 743. Accordingly, it is incontrovertible that respondent's conduct amounted to a clear violation of Section 8(a)(1) and (5) of the Act. *N.L.R.B. v. Katz, supra*; *N.L.R.B. v. Howard-Cooper Corporation*, 259 F. 2d 558, 561 (C.A. 9); *Carpinteria Lemon Association v. N.L.R.B.*, 240 F. 2d 554, 557 (C.A. 9), cert. denied, 354 U.S. 909; *N.L.R.B. v. Bonham Cotton Mills*, 289 F. 2d 903, 904 (C.A. 5), and cases cited therein; *N.L.R.B. v. Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529-530 (C.A. 9).

II. Substantial Evidence on the Record as a Whole Supports the Board's Findings That Respondent Violated Sections 8(a)(3) and (1) of the Act by Discharging Utra and Hoskins Because They Sought Union Support for Their Grievances

A. *Utra*

A careful analysis of the record amply supports the Board's conclusion that the Company discharged Utra because he successfully secured the intervention of the Union in his salary dispute with Duane Johnson, the Company's general manager. Thus, it is uncontested that, sometime in October, Utra discovered that he had been cheated out of \$554 in wages and demanded reimbursement from Duane Johnson, who agreed to make Utra whole for the improperly withheld wages.¹¹ When Johnson subsequently reneged on his agreement and refused to honor Utra's claim, the latter sought the assistance of the Union's national headquarters, which referred the matter to its local business agent, Gene Crumley. Sometime thereafter, Johnson complained to Utra regarding the latter's appeal to the Union for assistance. While professing that he was not afraid of anything the Union might do because he had unnamed "friends" who would "back him (Johnson) up", Johnson offered to write Utra a check for the full amount due him but insisted that Utra would have to endorse the check and return it to him. When Utra refused to assist Johnson in this subterfuge, Johnson became angry,

¹¹ As previously noted (pp. 5-6, n. 7), during the period November 1962-April 1963, the Company improperly withheld about \$12,000 of its employees' wages.

cursed the Union's business agent, and indicated to Utra that his days with the Company were numbered (*supra*, p. 7). Johnson was as good as his word—the next day, Utra was laid off. The Board properly viewed this concurrence of discharge with protected activity as evidence that the discharge was unlawfully motivated. As has been stated in another case involving similar circumstances, "It stretches credulity too far to believe that there was only a coincidental connection between [the employee's protected activities] on Monday, Tuesday and Wednesday and the abrupt termination of [his] employment on Thursday" *Angwell Curtain Company v. N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7). Accord: *N.L.R.B. v. Tak Trak, Inc.*, 293 F. 2d 270 (C.A. 9), affirming 128 NLRB 876, 877, cert. denied, 368 U.S. 938.

Moreover, the testimony of company officials concerning the reason for Utra's layoff was confusing and contradictory, and thus lent support to the Board's finding that Utra's dismissal was motivated by unlawful considerations. Thus, General Manager Johnson testified that he had personally laid off Utra because he was an outside painter and there was not enough outside painting work to keep Utra busy. Johnson added that when he laid Utra off he told him that "work had slowed down" (*supra*, pp. 7-8). Contradicting Johnson, Foreman Fred Schultz testified that he, and not the general manager, had laid Utra off. Although Schultz testified that the reason for Utra's layoff was poor enameling work, he admitted that the enameling work had been completed at least a week, and possibly 2 or 3 weeks, before

Utra's layoff. Schultz further admitted that he had not mentioned Utra's alleged poor work to him or criticized his work in any way when he laid him off (*supra*, p. 8). Moreover, the record fully supports the Board's finding that Johnson's testimony was "confused, incoherent, and self contradictory" (R. 41). Thus, in discussing his January 24 conversation with Utra (*supra*, p. 7, n. 8), Johnson said that Utra had asked him to hold the money for him so that he (Utra) would not gamble it away, that Johnson subsequently wanted to pay Utra the withheld subsistence so that he (Utra) "wouldn't forget that I [Johnson] had it," and that Utra complained to the International only because Hoskins had convinced him that Johnson was going to "beat him out of" the money. Johnson then stated that he offered to repay the money to Utra at that time but had subsequently changed his mind almost immediately after making this alleged offer because Utra "got smart about it," and told Johnson that he wanted to enlist the support of the Union because "he thought he could get more out of it." Johnson also testified that under the collective bargaining agreement, Utra was not entitled to subsistence (R. 171-173). Johnson's assertion that he did not owe Utra any subsistence under the collective bargaining agreement is manifestly at odds with his testimony that he had held the money out, pursuant to an agreement with Utra, and that he subsequently wanted to return the money and offered to do so. It is also inconsistent with his payment to Utra, one month later, of the money the latter claimed. Similarly, Johnson's assertion that he had

begun to pay the subsistence money to Utra because he was afraid he would suffer a lapse of memory and forget to repay him, and his charge that he offered to pay Utra all the money owed him at that time but Utra declined his offer because he (Utra) thought that he could get more money out of Johnson by going to the International, is entirely beyond belief.¹²

Similarly, the record reveals a crucial inconsistency in Johnson's sworn statements regarding the reason for Utra's layoff. Thus, in his testimony at the Board hearing, Johnson asserted (*supra*, p. 7) that Utra was laid off because there was no more outside painting to keep him busy. However, in his prehearing affidavit, Johnson stated that Utra's lay-off was occasioned by his poor enameling and paper-hanging work (R. Exh. 1, p. 2-3). It is, of course, well settled that where an employer assigns inconsistent or obviously incredible reasons for the discharge or dismissal of an employee, the Board's inference that the employee was discharged for discriminatory or unlawful reasons is thereby strengthened. *N.L.R.B. v. Dant*, 207 F. 2d 165, 167 (C.A. 9), and cases cited therein. Therefore, the record amply supports the Board's conclusion that Utra's discharge was motivated by his dispute with Johnson over the

¹² Utra credibly testified that while working for Johnson he had a savings account at a nearby bank and made deposits nearly every week into this account, and denied he asked Duane Johnson to hold any of his wages or subsistence for him (R. 236-238). Indeed, Utra's examination of Johnson's records makes it highly unlikely that Utra would give money to Johnson for safekeeping when a bank was available (see *supra*, pp. 5-6, n. 7).

payment of wages due him and Utra's attempt to have the Union intervene in his behalf. Accordingly, Utra's dismissal was manifestly in violation of Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9); *N.L.R.B. v. Symons Manufacturing Co.*, 328 F. 2d 835, 837 (C.A. 7). See *N.L.R.B. v. U.S. Divers Company*, 308 F. 2d 899, 905 (C.A. 9).

B. Hoskins

The record similarly supports the Board's finding that the discharge of Hoskins was also the result of his appeal to the Union for assistance in a salary dispute with Johnson. Thus, on December 6, Johnson delivered an ultimatum to the painters that they would be deprived of all overtime work unless they agreed to work overtime at time and a half instead of doubletime, as the collective bargaining agreement specified. Johnson then circulated a paper among the employees in which they purported to relinquish their rights to receive doubletime pay and requested them to sign it. Although a number of the painters signed this "agreement," Hoskins defied Johnson by telling him that he would not sign "the damn thing."

On the following day, Hoskins reported to the Union's business agent, Gene Crumley, that Johnson had deliberately refused to honor the terms of the collective bargaining agreement. Crumley visited the job site several days later and warned Johnson that the Union would not tolerate a unilaterally imposed reduction in the overtime rate specified in the

collective bargaining agreement. Shortly thereafter, Johnson must have learned that it was Hoskins who had reported his contract violations to the Union. For, according to uncontradicted testimony, Johnson assembled the employees and stated that one of them had complained to the Union and had gotten Johnson into trouble with Gene Crumley. Johnson left no doubt in the minds of the employees as to how he would deal with the offender: he informed the employees that he would find some pretext or other and dismiss the employee in question forthwith. Making it clear that his threat of dismissal was aimed directly at Hoskins, Johnson singled the latter out on two occasions during the meeting for special comment: first, Johnson looked directly at Hoskins and said that one of his employees had "put Gene Crumley on his back"; then, as he was leaving the meeting, just after his threat to dismiss the informant, Johnson looked at Hoskins, pointed at him and said, "I want you to remember that" (*supra*, p. 9).

In fulfillment of Johnson's threat, Foreman Fred Schultz laid Hoskins off the very next day, on clearly pretextual grounds. Thus, according to uncontradicted testimony, at the time he was laid off, Hoskins was told by Schultz that everyone receiving subsistence pay was being laid off. However, the Company's own payroll records show that this statement was not true and that employees drawing subsistence pay remained on respondent's payroll for months after Hoskin's dismissal (*supra*, p. 9). Accordingly, it was well within the Board's discretion to find

that Hoskin's dismissal, like Utra's, violated Section 8(a)(3) and (1) of the Act. See cases *supra*, p. 18.

C. *The Board's reversal of the Trial Examiner*

As noted above, the Trial Examiner recommended that the 8(a)(3) allegations in the complaint be dismissed on the grounds that the testimony of Company officials, particularly that of Foreman Fred Schultz and Robert Cleveland, that Hoskins and Utra had been dismissed for nondiscriminatory reasons, was credible. The record, however, fully supports the Board's conclusion that the testimony of Schultz and Cleveland, as well as that of General Manager Duane Johnson,¹³ as to the discharges of Hoskins and Utra, were "so grossly confusing, self contradictory, equivocal, evasive, and in part apparently false, as to render such credibility findings wholly insupportable" (R. 39). Thus, as noted above (*supra*, pp. 15-16), Johnson and Schultz could not even agree upon who had laid Utra off, much less the reasons for his lay-off. Johnson testified that Utra was laid off by himself because of a slowdown in outside painting work. On the other hand, Schultz testified that he had laid off Utra because of the latter's poor enameling work. Schultz's testimony on this point is clearly suspect because, as he himself acknowledged, he did not mention Utra's allegedly poor work to him when he laid Utra off, and because Utra, who was not laid off until January 25, had admittedly completed his enam-

¹³ For complete discussion of Johnson's testimony see *supra*, pp. 15-17.

eling work in the early or middle part of January. Moreover, Hoskins testified, without contradiction, that at the time of his layoff, he was informed by Foreman Schultz that the Company was laying off everyone who was drawing subsistence; the Company's own records (*supra*, pp. 9, 19) disclose that Schultz's explanation for Hoskins's discharge was without foundation in fact. Accordingly, his testimony relating to Hoskins's dismissal is clearly not worthy of being credited. Similarly, the discredited testimony of Schultz and Cleveland that no acts of unlawful interference occurred at the December 6 meeting (see R. 203-206, 222-224) scarcely supports the Examiner's recommendation that their testimony relating to the discharges of Utra and Hoskins be accepted at face value. For ". . . in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659.

It is true, as this Court has noted, that matters of credibility are generally for the trier of fact. *N.L.R.B. v. I.L.W.U., Local 10*, 283 F. 2d 558, 562. But this does not mean that the Board must "rubber stamp" a trial examiner's credibility resolutions when its own careful analysis of the record discloses deficiencies in the examiner's analysis which "create doubts with respect to the truthfulness of a witness so powerful that they outweigh any evaluation based on demeanor." *N.L.R.B. v. Jackson Maintenance Corp.*, 283 F. 2d 569, 570 (C.A. 2). As we have shown, this is just such a case and the Board, relying

on the entire record, including the discrepancies and obvious untruths in the testimony of respondent's witnesses, properly overruled the Trial Examiner and found the discharges to have been discriminatorily motivated. *N.L.R.B. v. Jackson Maintenance Corp.*, *supra*; *N.L.R.B. v. Pacific Intermountain Express Co.*, 228 F. 2d 170, 172-174 (C.A. 8), cert. denied, 351 U.S. 952; and see *Utica Observer-Dispatch, Inc. v. N.L.R.B.*, 229 F. 2d 575, 577 (C.A. 2). We submit that the Board's findings are supported by substantial evidence on the record considered as a whole and, accordingly, that they are entitled to affirmance on review.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.¹⁴

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

WARREN M. DAVISON,
HAROLD B. SHORE,
Attorneys,

National Labor Relations Board.

November 1966.

¹⁴ Respondent contended before the Board that its refusal to pay the overtime rates specified in the collective-bargaining agreement was a contractual violation redressable in the courts, rather than an unfair labor practice under the jurisdiction of the Board. This contention is wholly without merit. As the Examiner noted (R. 22), "The gravamen of this case is that the Company's course of conduct bypassed the certified collective bargaining representative of the employees and undermined the entire statutory relationship between the employees and their collective bargaining representative. . . . The purpose of this proceeding is to enforce the statutory mandate to bargain collectively and it is only incidental that part of the remedy will make whole employees who have been deprived of wages by the Company's [violation of the contract]." It is, of course, well settled that the existence of other tribunals which might be able to hear the case and afford relief to the parties in no way affects the exclusive jurisdiction of the Board to remedy unfair labor practices, as such. Section 10(a) of the Act; *Local 174, Teamsters, etc. v. Lucas Flour Co.*, 369 U.S. 95, 101, note 9; *Garner v. Teamsters, etc.*, 346 U.S. 485, 489-491. And see *Smith v. Evening News Assn.*, 371 U.S. 195, 197.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Pursuant to Rule 18(f) of the Rules of the Court

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received In Evidence</u>
1-A through 1-M	7	7
2	8	9
3	9	10
4, 5 and 6	11	31
7	12	31
8	32	32
9	32	34
10	104	130
11	105	130
12	116	117
13	153	

RESPONDENT'S EXHIBITS

1	265	265
2	265	265
3	265	265
4	240	240

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERTO GONZALES BARQUERA, JR.,
Petitioner-Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents-Appellees,

✓
No. 21035

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

MICHAEL BUZZELL
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-0311

Attorneys for Respondent-Appellee

FILED

NOV 23 1966

WM. B. LUCK, CLERK

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERTO GONZALES BARQUERA, JR.,
Petitioner-Appellant,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents-Appellees,

No. 21035

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

On July 10, 1961, a judgment of conviction was entered against petitioner for the crimes of sale and

conspiracy to sell narcotics. On July 11, 1961, a separate judgment of conviction was entered against petitioner for the crime of possession of a narcotic. Petitioner appealed both convictions, and both of the convictions were affirmed. See People v. Barquera, 207 Cal.App.2d 725 and People v. Barquera, 208 Cal.App.2d 104.

In December of 1964, petitioner filed in the California Supreme Court an application for a writ of habeas corpus. The grounds set forth by petitioner as a basis for relief were substantially similar to those set forth in the instant proceeding with the exception of the charge of police brutality which has been omitted. The California Supreme Court denied this petition without opinion. A copy of this petition is attached as "Appendix A."

B. Proceedings in the Federal Courts.

In May of 1965, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California (CT 26). Judge Sweigert of that Court denied the petition for writ of habeas corpus on December 20, 1965 (CT 37). On April 22, 1966, an order was issued granting appellant's application for a certificate of probable cause and allowing appellant to appeal in forma pauperis (CT 43).

SUMMARY OF APPELLEE'S ARGUMENT

A. The July 10, 1961, conviction

1. The question of sufficiency of the evidence should be disregarded in this proceeding.

2. The question of competency of counsel should be disregarded in this proceeding.

3. Appellant is precluded from raising the question of advice as to constitutional rights in relation to alleged extra-judicial statements.

4. Appellant's contention that he was improperly denied the right of discovery during the preliminary hearing does not raise a federal issue.

B. The July 11, 1961, conviction

The appellant is entitled to no relief under the doctrine of McNally v. Hill, 293 U.S. 131 (1934).

ARGUMENT

A. THE JULY 10, 1961, CONVICTIONS

I. THE QUESTION OF SUFFICIENCY OF THE EVIDENCE SHOULD BE DISREGARDED IN THIS PROCEEDING.

Appellant complains that the evidence was insufficient to support the verdict. He apparently is arguing, as he did on appeal, that there was a gap in the chain of possession of the heroin introduced at the trial. The facts set forth below, as discussed in the California District Court's opinion, refute appellant's contention.

People's Exhibit One was not received into evidence. As to Exhibits Two through Five, however, a chain of possession was clearly established. The police agent who purchased the heroin from appellant turned the heroin stored in balloons over to a chemist in sealed envelopes. The chemist opened the envelopes and determined that each balloon contained heroin. The chemist thereupon stored the heroin in vials, placed the vials in the envelopes, resealed the envelopes and stored them in a safe of the California State Building in Los Angeles where they remained until the preliminary hearing. At the conclusion of the preliminary hearing, the heroin stored in plastic vials was received by the municipal court. The chemist did not see the exhibits again until he testified at the trial.

During the chemist's testimony at the trial, it became apparent that the vial from the envelope of Exhibit One had been misplaced into the envelope of Exhibit Four, which at the time of trial contained two vials rather than one. Since the chemist testified that each vial contained heroin, the California District Court of Appeal correctly held that any mix-up of the fungible powder itself could not have prejudiced appellant. The court further held that the prosecution had reasonably established a continuous chain of custody from the date the contraband was received from appellant until its admission into evidence at trial.

See People v. Barquera, 208 Cal.App.2d 104 (1962).

Appellant also complains that his conviction of conspiracy to sell narcotics was not proved. The record flatly disputes this contention. Relevant portions of the trial transcript are attached as "Appendix B." Appellant was charged as taking part in three overt acts establishing the conspiracy, number three, number six and number seven. With respect to overt act number three, agent Cota testified that he met appellant's co-defendant Gomez on March 3, 1961 (RT 146). Agent Cota asked Gomez to obtain some heroin (RT 146-147) and Gomez said that he could get a quarter-ounce, but that Cota would have to wait for appellant (RT 147). Appellant appeared shortly thereafter and engaged in a conversation with Gomez. During this conversation appellant was looking at Agent Cota who was waiting in a nearby car (RT 147-148). Ultimately Cota gave appellant seventy dollars to purchase heroin, which appellant did. The evidence with respect to overt acts six and seven is similar to the foregoing (RT 175-177). Obviously, then, appellant's charge that the conspiracy was not proved is sham.

Moreover, in order for habeas corpus to lie in respect to sufficiency of the evidence, there must be an utter lack of evidence which would render the conviction a violation of due process. Buchanan v. McGee, 290 F.2d 711

(9th Cir. 1961). This is hardly the present case.

II. THE QUESTION OF COMPETENCY
OF COUNSEL SHOULD BE DIS-
REGARDED IN THIS PROCEEDING.

Appellant urges that his counsel was ineffective. He does not point to one fact upon which this assertion is based, and this allegation was not raised on appeal. Appellee assumes that appellant is urging that he should not have been tried jointly with the co-defendants for this argument was made in his petition to the California Supreme Court, although in that court, as in the instant case, no facts were alleged in respect to effectiveness of counsel upon which appellant would have his conviction overturned. Under California law a joint trial was proper, as the crimes charged generally involved the same defendants and the commission of each crime involved common elements. People v. Chapman, 52 Cal.2d 95 (1959).

In asserting this position appellant stated the following:

"While it will be conceded that as whole [sic] defense counsel defended the case rather well, she grossly erred in allowing petitioner to be tried jointly when the various counts of the information charged distinct and separate offenses not related to one another in any way or form."

Since appellant has failed to allege any facts to support his

contention that he was denied effective aid of counsel because of the joint trial in the State courts, he has failed to exhaust available California remedies and should be precluded from raising this issue in the Federal courts. Conway v. Wilson, Civil No. 20470 (9th Cir. October 28, 1966).

In any event, there is no merit to this contention of appellant. The question of the competency of counsel is not reviewable on habeas corpus proceedings in the absence of such a showing of incompetence as to make the trial a farce or a mockery of justice. Palakiko v. Harper, 209 F.2d 75 (9th Cir. 1953). Hurst v. California, 211 F.Supp. 387 (N.D. Cal. N.D. 1962). That appellant's trial was not a farce or mockery of justice is apparent from his concession that defense counsel presented his case rather well.

III. APPELLANT IS PRECLUDED FROM
RAISING THE QUESTION OF ADVICE
AS TO CONSTITUTIONAL RIGHTS IN
RELATION TO ALLEGED EXTRA-
JUDICIAL STATEMENTS.

Appellant alleges that certain statements made by him which were received into evidence were taken in violation of his constitutional rights. This argument is primarily based upon Escobedo v. Illinois, 378 U.S. 478 (1964). Appellant's trial occurred in 1961. Inasmuch as the doctrine of Escobedo does not apply to cases in which

the trial began prior to June 22, 1964, there is no merit to appellant's claim that he was not advised in accordance with the doctrine of Escobedo. Johnson v. New Jersey, 384 U.S. 719 (1966).

IV. APPELLANT'S CONTENTION THAT
HE WAS IMPROPERLY DENIED THE
RIGHT OF DISCOVERY DURING THE
PRELIMINARY HEARING DOES NOT
RAISE A FEDERAL ISSUE.

Appellant complains that the magistrate at the preliminary hearing improperly denied defense counsel's motion that all notes utilized by the undercover agent be made available to the defendants. Significantly, these notes were made available at trial where they proved to be of little or no value for impeachment, the only purpose for which they could be used. See People v. Barquera, 208 Cal.App.2d 104 (1962). For this reason, appellee submits that the denial of the motion for discovery at the preliminary hearing raises no federal question. Further, even if it be assumed that a federal right is involved, the fact that the notes were made available at trial indicates compliance with the federal rule. Jencks v. United States, 353 U.S. 657 (1957).

B. THE JULY 11, 1961, CONVICTION

THE APPELLANT IS ENTITLED TO NO
RELIEF UNDER THE DOCTRINE OF
McNALLY v. HILL.

The District Court did not consider the contentions

urged in respect to the July 11, 1961, conviction since appellant's attack on his first conviction for which he is also confined was without merit. Appellee submits that this determination of the District Court was correct.

McNally v. Hill, 293 U.S. 131 (1934). Nevertheless, appellee will briefly discuss appellant's arguments as they relate to the later conviction. Appellant first contends that he was the victim of an unlawful search and seizure. Secondly, he argues that the submission of the case on the transcript of the preliminary hearing was improper.

The following facts, as set forth in People v. Barquera, 207 Cal.App.2d 725 (1962), were personally known to the arresting officers at the time of appellant's arrest:

1. That appellant had been associating with persons connected with the narcotics traffic;
2. That appellant had suffered two prior narcotics convictions;
3. That a police department from another state had indicated that appellant was in the narcotics traffic;
4. That appellant began to run and appeared to throw something in his mouth when the officers identified themselves; and
5. That appellant dropped two objects.

Clearly, the foregoing facts were sufficient to establish probable cause for appellant's arrest, and the search incidental to this arrest was legal. Williams v. United States, 273 F.2d 781 (9th Cir. 1960, cert. den. 362 U.S. 951); see also, Beck v. Ohio, 379 U.S. 89 (1964).

With reference to the submission of the case on the basis of the transcript of the preliminary hearing, appellant himself admits that he agreed to such a procedure and objected in no way. Hence, there is no constitutional infirmity involved. Wilson v. Gray, 345 F.2d 282 (9th Cir. 1965).


CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for the writ of habeas corpus should be affirmed.

Dated November 23, 1966.

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

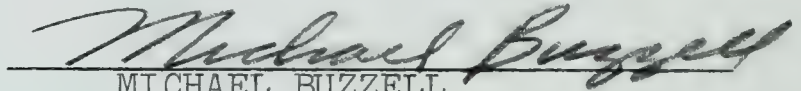

MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 23, 1966.


MICHAEL BUZZELL
Deputy Attorney General

A P P E N D I C E S

RECEIVED
ATTORNEY GENERAL

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DEPARTMENT OF JUSTICE
SAN FRANCISCO OFFICE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NO. _____

THE PEOPLE OF THE STATE OF CALIFORNIA

TO: The Presiding and Associate Justices
of the Above-Entitled Court.

PETITION FOR WRIT OF HABEAS CORPUS

Alberto Gonzales Barquera Jr.
Petitioner
In Propria Persona
Box No. A-67294
Tamal, California

(C O V E R)

EXHIBIT A

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Alberto Gonzales Barquera Jr.,

Petitioner,

-against-

Lawrence E. Wilson, as Warden
of California State Prison, at
San Quentin, California,

Respondent.

SUPREME COURT

Docket No. _____

PETITION FOR A WRIT OF HABEAS CORPUS

Persuant to Section 1473 of the Penal Code.

TO: The Honorable Roger J. Traynor, as Chief Justice of the
California State Supreme Court, and the Associate Justices.

The petition of Alberto Gonzales Barquera Jr. at present
confined and restrained of his liberties by the respondent Warden
by virtue of Judgments of conviction which are as it will be shown
at infra void and without any effect in Law and force respectfully
shows as follows:

GENERAL STATEMENT

The District Attorney of the County of Los Angeles, by infor-
mation No. 292580 duly filed in the California State Superior
Court, on January 31, 1961 charged your petitioner with a vio-
lation of Sec. 11500 of the California Health and Safety Code,
to wit: Possession of a Narcotic, i.e., "Heroin", and further

with a previous violation of Sec. 11500 of the California Health and Safety Code. Gl. Tr. Folio 58 - 59.

Further, the District Attorney of Los Angeles County, filed on May 3rd, 1961, in the Los Angeles County Superior Court, information No. 297919, Charging in its 6 counts, the following offenses:

Count I one Salvador M. Gomez and Francisco Lopez, with violation of Sec. 11501 of the California Health and Safety Code.

Count II one Salvador M. Gomez and Rigoberto Gomez, with violation of Sec. 11501 of the California Health and Safety Code.

Count III one Salvador M. Gomez and Alberto (Kolo) Barquera Jr., with violation of Sec. 11501 of the California Health and Safety Code.

Count IV one Salvador M. Gomez and Vera Caballero, with violation of Sec. 11501 of the California Health and Safety Code.

Count V one Salvador M. Gomez and Alberto Barquera Jr., with violation of Sec. 11501 of the California Health and Safety Code.

Count VI with seven (7) overt acts of Conspiracy to violate Sec. 11501 of the Health and Safety Code, in violation of Sec. 182 Penal Code.

Significantly enough the third, sixth and seventh overt acts of the 6th count of the information merely states:

Overt act no. 3 "That on March 3, 1961 defendants Alberto Barquera Jr., and Salvador M. Gomez, did meet and had a conversation," and the

Overt act no. 6 "That on March 21, 1961, defendants Alberto Barquera Jr., and Salvador M. Gomez, did meet and had a conversation" while

Overt act No. 7. alleges:

That on March 21, 1961, defendants Alberto Barquer Jr., and Salvador M. Gomez, did leave the 700th Block of East 12th St. in a motor vehicle and returned in the vehicle together, 15 minutes later.

and said information further charges as with regards to your petitioner with a previous felony conviction for violating Sec. 11500 of the California Health and Safety Code. Cl. Tr. folio 1 - 1-.

On the possession charge, Sec. 11500 Health and Safety Code, the record at Cl. Tr. folio 66, shows that by stipulation, a jury trial was waived and the cause submitted to the Court, (Superior Court of the County of Los Angeles, Dept. 110, thereof, the Hon. Joseph L. Call, J.P.) upon the Municipal Court transcription information No. 292580.

While on information No. 297919, the cause was brought to trial in the California State Superior Court, Dept. 110 thereof, the Hon. Joseph L. Call, J.P., a jury trial was likewise waived, and defendants found guilty as charged by the Court. Cl. Tr. .

Sentences of confinement in State Prison for terms as prescribed by law, were duly imposed, to run concurrent with any other sentences. Cl. Tr. folios 14 on information No. 297919 and Cl. Tr. folio 67 on information No. 292580.

Notices of Appeal to the California District Court of Appeals, Second Appellate District were duly filed, and on September 20, 1961 in Case No. 7923, the possession charge, that Court, affirmed the Judgment of Conviction, as it also did in Case No. 7922, on October 1, 1962, the sales and conspiracy charges.

No application for a hearing in this Court has been made, nor was the convictions attacked collaterally in any Court of the United States or California Jurisdiction.

STATEMENT OF FACTS

Since this petition alleges the invalidity of both judgment of conviction, although separate and distinct, yet closely related, we shall deal with our narrative of the facts and arguments in law in that order.

A. The facts concerning information No. 292560.

By stipulation with defense Counsel, it was introduced in the record of the Preliminary hearing, (the matter was submitted to the Superior Court on that transcript) that one W. G. Penprase, is a qualified forensic expert, employed by the Los Angeles Police Department, and that the evidence introduced in Court is heroin. T.R. 2:12-3:18. Since at no time did the defense challenge this fact, we need not be concerned with it.

H. J. Virgin, testifying for the prosecution, testified as follows:

That he is a police sergeant for the City of Los Angeles, attached to the Narcotic Division, T.R. 4:24 - 26, that on January 3, 1961, he arrested the petitioner, T.R. 5:5 - 8, at 5444 Hunting Drive, T.R. 5:12, that prior to such arrest he had some knowledge concerning the defendant, T.R. 5:20 - 21, having investigated your petitioner for approximately two years, having known him to be in company with many large-time narcotic peddlers. T.R. 6:5 - 8. Defense Counsel's objection to this line of questioning is overruled by the Court, T.R. 6:9 - 11, and the witness continues by naming one Sabas

Agadocia, one Salvador Gomez, and goes in detail as to these men's criminal activities and record T.R. 6:12 - 7:5 and also that he had a letter from the El Paso (Texas) Police Department, which suspected that petitioner was engaged in - - - T.R. 7:5 - 7 and that prior to the January 3, 1961, arrest, he checked petitioner's record more than once, and that petitioner had two prior narcotic convictions, and that he talked with him concerning his narcotic activities, T.R. 9:3 - 15, that immediately prior to his arrest on January 3, 1961, he first observed the defendant's car parked in the vicinity of Ord and Hewhigh, that he drove around the block, where he observed petitioner talking to a person that he knows as Tommy Bustos, who was convicted of narcotics, and is selling narcotics on the street, that ten minutes later, petitioner went back to his car and drove to 5444 Hunting Drive, where he parked his car in the rear of that address and went to a storeroom underneath the house next door, T.R. 9:18 - 10:4, that he observed petitioner putting his hand and shoulder and part of his head in the storeroom, then going into the house, staying there for about 10 - 15 minutes, came out again, and went directly to the storeroom again, at which time, the witness and his partner, called him by his nickname of "Nolo", T.R. 10:5 - 16, that as his partner called him by name, the defendant threw something toward his mouth, and as he did so two objects fell to the ground directly at his feet, and that then the defendant turned and ran, tripped on some stairs, and as he fell, the witness and his partner seized him. T.R. 10:17 - 23.

That he had a conversation with petitioner, at which were present his partner Sgt. Cumming, and while arrested petitioner allegedly admitted ownership of the stuff, (i.e., Narcotics) T.R. 12:9 - 16, that they took him to the Receiving Hospital to have

the "skinned" is patched up. T.R. 12:17 - 19. On cross examination, the witness testified that he did not have an arrest warrant for him, T.R. 13:17, nor a warrant to search the house, and

"Did anybody search the house, to your knowledge?"

"No, we started to, but changed our minds."

"How far did you start?"

"We got as far as the bathroom, and we found other ballons similar to these, measuring sopas - - - T.R. 13:20 - 26. and

"After we arrested the defendant, we took him to the living room and then into the bedroom. We sat him down in the bedroom, where we started to make the search. We did make the search, and then returned him by the same method going through the bedroom, to the living room and outside. We had no search warrant.. T.R. 14:15 - 20..

and:

Q. "You didn't find any narcotics in the house, did you?"

A. No, ma'am.

Q. You went in there to look for narcotics, didn't you?

A. Principally, yes.

Q. Did you go over to the storeroom and look through it?

A. Yes ma'am. T.R. 15:5 - 1).

and:

"You say you have known this defendant for two years. Did you ever talk to him any time during that two years?"

"Yes ma'am.

"Did he know who you were?"

"Yes.

"Did you ever place him under arrest during that two years?"

"No, just stopped hi. for questioning on three or four occ-

"On those three or four occasions, did you also search him those times, too"?

"Yes, ma'am."

"Did you have a warrant on any one of those occasions"?

"No."

"On none of those occasions did you find any narcotics"?

"No." T.R. 17:25 - 18:16.

and:

"The reason you called for Nolo to stop was because you wanted to search him, didn't you"?

"I wanted to know wether he had any narcotics in his person."

T.R. 21:8 - 11.

and:

"Isn't it a matter of fact that this man was kicked badly up and down his legs, and his mouth beaten until he was swollen quite badly at the time these pictures were taken"?

"No ma'am. He was taken to the Receiving Hospital. He had a contusion on one knee, which was slight. - - - T.R. 23:25 - 24:5.

and:

"Counsel, we had no reason to search the storeroom, in my opinion. T.R. 45:1 - 2.

THE FACTS CONCERNING INFORMATION NO. 297919.

This information charges five counts of violation of Sec. 11501 of the Health and Safety Code, and one count of conspiracy in violation of Sec. 182 P.C., the Sixth count of the information. Since in addition to the conspiracy count, the information deals with your petitioner only in counts three and five, petitioner shall

confine himself only to an evidentiary review of these counts.

Quoting ad verbatim:

Q. Agent Cota, do you recall the date of March 3, 1961?

A. Yes, Sir, I do.

Q. And on that date did you see one of these defendants?

A. I saw two of the defendants.

Q. Which one did you see first?

A. Salvador Gomez.

Q. Where?

A. At the rear of the Texas Club in the parking lot.

Q. Did you have a conversation with him?

the Court: Wait. He saw two of them, and he only gave the name of one.

y Mr. Wheatcroft: I take it you saw one first, is that right?

A. Yes, Sir.

Q. Then another one, later on?

A. Yes.

the Court: Which one later on?

the Witness: Alberto Barquera. T.R. 18:26 - 19:20.

nd:

Q. "Did you talk to Salvador Gomez about narcotics?"

A. Yes, I did. T.R. 19:21 - 23.

nd:

Q. "do you recall the conversation?"

A. Yes, I asked Salvador Gomez, "Chava, can I pick a half."

And he said, no "There isn't anything."

I said, "Well, can I at least pick up a quarter"?

I need it right away - - -



Salvador Gomez stated "Yes, you can pick up a quarter, but wait for Kolo, (petitioner's nickname). T.R. 20:1 - 12.

and:

"About five minutes later, after having the conversation with Salvador Gomez, I observed Alberto Barquera and Salvador Gomez holding a conversation in the center of the parking lot and looking in the direction of where I was in the State vehicle. I then observed Alberto Barquera walk toward the State vehicle enter, seating himself in front seat, the passenger side and stating, "Tony, how are you"? T.R. 20:23 - 21:5

and:

Q. "Calling your attention to March 21, 1961, do you recall that date, sir"?

A. "Yes, sir, I do."

Q. "Did you see one or more of the defendants on that date"?

A. "Yes, sir, I did."

Q. Which one?

A. I saw both defendants Alberto Barquera and Salvador Gomez.

T.R. 33 - 24 - 34 - 6.

and:

I asked Barquera if it would be possible to pick up five pieces like we had talked about before.

He said: "Yes, just pay the money," He says: "I will have the stuff ready." T.R. 35:22 - 25.

Significantly the record shows that testimony as to each count was taken, the evidence pertaining to that count was introduced in evidence.

T.R. 11:1 - 3	Count I.
T.R. 17:23 - 25	Count II.
T.R. 23:5 - 7	Count III.
T.R. 32:26 - 33:3	Count IV.
T.R. 36:5 - 12	Count V.

Further, the record shows at T.R. 37:5 - 39:2 that the witness had a conversation with your petitioner, subsequent to March 21, 1961 during which conversation petitioner allegedly admitted ownership of the narcotics.

Another prosecution witness is William J. Arnold, a qualified forensic expert employed by the State Narcotics Bureau. On direct testimony, T.R. 121:14 - 123:13, the witness testifies in substance as follows:

He identifies the five exhibits previously introduced in evidence and that they contained heroin, and goes into detail as to the proceedings from the time they were received by the agent until the time that they were produced in Court.

In cross examination, at T.R. 125, the witness is asked:

Q. "And were the contents the same as they are now, or similar?"

T.R. 125:4.

A. No, ma'am, they were not. In some cases the plastic vials were not included within the exhibit. The powdery substance was merely in a rubber balloon, in which case I opened the balloon and removed the contents and placed the material in a plastic vial, if a plastic vial was not already present.
T.R. 125:11.

and:

"To the best of my knowledge, People's 2 and 3 were not in the plastic vial when I first received them. T.R. 125:16 - 18

LEGAL CONTENTIONS

- I. As to information No. 292580, the possession charge.
 - ✓ A. Evidence obtained by means of an illegal search and seizure.
 - B. Evidence obtained by police brutality.
 - ✓ C. Waiver of the right to a trial jury and submission on the preliminary hearing transcript prejudicial error.
- II. As to information No. 297919, the sales charge.
 - ✓ A. Evidence insufficient to sustain a conviction.
 - ✓ B. No continuous chain of possession of the evidence was proven, but quite contrary there was prove that petitioner was the victim of harassment by narcotic officer for some two years.
 - ✓ C. Ineffective aid of Counsel.
 - ✓ D. No conspiracy charge proven.
 - ✓ E. Evidence obtained with the aid of an unreliable informer.
 - ✓ F. Evidence obtained by interrogation without Counsel.

POINT I

Evidence obtained as a result of an illegal search and seizure on information No. 292580. 11500

Where a defendant raises the issue of an illegal search and seizure, the factual test is not concerned with what evidence the search produced, but with the authority of the searching officers to make the search.

The record clearly establishes that for almost two years, your petitioner was the object of an intensive harassment on the part of one Sgt. Virgil, attached to the Los Angeles Police Department

and its Narcotic Bureau. Petitioner was stopped at frequent intervals questioned and searched, and every movement of his, carefully watched. We are told that the Police Department had cause to believe that he was engaged in the traffic of narcotics. The fact remains, undisputed and unchallenged that the authorities in the instant case, had ample opportunity to obtain a search warrant, if they felt that they had in their possession sufficient information to satisfy a magistrate that there was "sufficient probable cause."

In Nick Alford Aguilar v. Texas, No. 548 October Term, 1963, United States Supreme Court held by Mr. Justice Goldberg held:

"In Ker v. California, 374 U.S. 23, We held that the Fourth Amendment proscriptions are enforced against the States through the Fourteenth Amendment," and that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, although Ker involved a search without a warrant, that case must certainly be read as holding that the standards for obtaining a search warrant is the same under the Fourth and Fourteenth Amendments." an evaluation of the constitutionality of a search warrant should begin with the rule, that the informed and deliberate determinations of magistrate empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.

In the instant case the officer openly and brazenly avows that over a period of almost two years that he had your petitioner under constant surveillance, he searched his person and premises several times, always with a negative result and invariably without a search warrant United States v. Lefkowitz, 285 U.S. 452, 464. The reason for this rule go to the foundation of the Fourth Amendment a contrary rule "that the evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Fourth Amendment to a nullity and leave the peoples homes secure only in the discretion of police officers Johnson v. U.S. 333 U.S. 10.

Under such a rule "resorts to warrants, would ultimately be discouraged."

Jones v. U.S. 362 U.S. 257, 270.

Thus, when a search is based upon a magistrate's rather than a police officer's determination of probable cause, the reviewing courts will accept evidence of a less "judicially - competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as there was substantial basis for the magistrate to conclude that the narcotics were probably present.

"The point of the Fourteenth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inference which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Johnson v. U.S. supra.

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the Court must still insist that the magistrate perform his "Neutral and detached" function and not serve merely as "a rubber stamp" for the police.

In Nathanson v. U.S. 290 U.S. 41, a warrant was issued upon the sworn allegation that the affiant "has cause to suspect" and does believe, that certain merchandises was in a specified location.

The Court noting that the affidavit "went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts," announced the following rule:

"Under the Fourth Amendment, as officer may not properly issue a warrant to search a private

dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation mere affirmance of belief or suspicion is not enough.

The Court in Giordenello v. U.S., 357 U.S. 460, applied this rule to an affidavit similar to that relied upon here. The Court announced the following guiding principles:

"That the inferences from the facts which lead to the complaint must be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. U.S., 333 U.S. 10, 14.

The purpose of the complaint then, is to enable the appropriate magistrate - - - to determine whether the "probable cause" required to support a warrant exists. The magistrate must judge for himself to show probable cause. He should not accept without question the complaint is mere conclusion.

In the instant case "the mere conclusion" that petitioner was engaged in the traffic of narcotics was not even that of the affiant himself, it was that of an unidentified informant, and often vague related information.

The Fourth Amendment to the U.S. Constitution provides:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, . . .

It is argued that the search and seizure was justified as incidental to a lawful arrest. Unquestionably, when, a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit-a-crime.

Weeks v. U.S. 232 U.S. 383

Agnello v. U.S. 269 U.S. 20

This right to search and seize without a search warrant extends to things under the accused's immediate control.

Carroll v. U.S. 267 U.S. 132

Brinegar v. U.S. 338 U.S. 160

and to an extent depending on the circumstances of the case, to the place where he is arrested.

Agnello v. U.S. 269 U.S. 30

Marron v. U.S. 275 U.S. 192

United States v. Rabinowitz, 339 U.S. 56

The rule allowing searches is justified for example by the need to seize weapons and other things which might be used to assault an officer or to effectuate an escape.

Roberts v. Cassey, 36 App. 2d Supp. 767.

Fox v. Windenere Hotel Apt. Co. 30 Cal. App. 162.

People v. Vaughn, 65 Cal. App. 2d Supp. 844

United States v. Jeffers, 342 U.S. 48

Mapp v. Ohio, 367 U.S. 643

and in McDonald v. U.S. 335 U.S. 451, the Court held:

"This is not a case where the officers, passing on the Street, hear a shout and a cry for help and demand entrance in the name of the law. They have been following petitioner, keeping him under surveillance for several months.

Where as here, officers are not responding to an emergency there must be compelling reasons to justify the absence of a search warrant.



Evidence obtained by police brutality.

The record clearly establishes that immediately following the arrest and preceding the searches, a scuffle ensued between petitioner and the arresting officers and that following such a scuffle, petitioner's premises were searched without a warrant and while arrested petitioner allegedly made some statements to the police officers.

In Danny Escobedo v. State of Illinois, U.S. Supreme Court No. 615, October Term 1963, the Court held:

"It is well settled that the duty of Constitutional adjudication, resting upon this Court requires that the question whether the "Due Process Clause" of the 14th Amendment has been violated by admission into evidence of a coerced confession."

Ashcraft v. Tennessee, 322 U.S. 143.

and we cannot escape the responsibility of making our own examination of the record.

Spano v. United States, 360 U.S. 315.

and:

"It cannot be doubted that placed in this position in which your petitioner was, the result was to produce upon his mind that fear that if he remained silent it would be considered an admission of guilt, and it cannot be conceived that the converse impression would not have also naturally arisen, that by obeying there was hope of removing the suspicion from himself."

Bram v. U.S. 168 U.S. 532

Ex parte Sullivan, 107 F. Supp. 514

Cannon 9 of the American Bar Association

Cannons of Professional Ethics.

Watts v. Indiana, 338 U.S. 49

and:

§ Wignore on Evidence at pg. 309.

"Any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence and to be satisfied with an incomplete investigation of the other sources. The exercise of power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there seems to be a right to the expected answer, that is to a confession of guilt. Thus the legitimate use grows into the unjust abuse, ultimately the innocent are jeopardized by the encroachments of a bad system.

POINT III

Waiver of the right to a Trial Jury and Submission on the Preliminary Hearing Transcript prejudicial error.

Although the record before us establishes that petitioner agreed to such a waiver of the right to a Jury Trial, and submission on the Preliminary Transcript, the record does not show any assent by petitioner to the submission on the transcript without cross examination or confrontation of the witnesses, and the record also fails to show any objection by petitioner to this procedure.

In Frederick Gray v. Wilson, No. 41890, U.S. District Court, Northern District of California, Southern Division, Mr. Alfonso J. Zirpoli, J.P., the Court held:

"At the outset it should be noted that counsel have not cited any case where a federal court has specifically ruled that the right to cross examination and confrontation is embodied in the due process clause of the 14th Amendment. However the Supreme Court has held that procedural Due Process requires that a State Bar Association permit an applicant to

cross examine and confront the witnesses against him in an administrative hearing . . . Willmer v. Committee on Character, 373 U.S. 96

If a State must accord the right to cross examination and confrontation in an administrative hearing, a fortiori it must accord such rights in a criminal trial. Moreover, the right to cross examine and confront is essential to a fair trial if the rules of procedure are to have as one of their objects the ascertainment of the truth.

Wigmore on Evidence Vol. 5, pg. 28, Sec. 1367.

The Court therefore holds that the right of the accused to cross examine and confront prosecution witnesses in a State Criminal trial is guaranteed by the due process clause of the 14th Amendment.

The accused may however waive his right to cross examination and confrontation.

Diaz v. U.S. 223 U.S. 442.

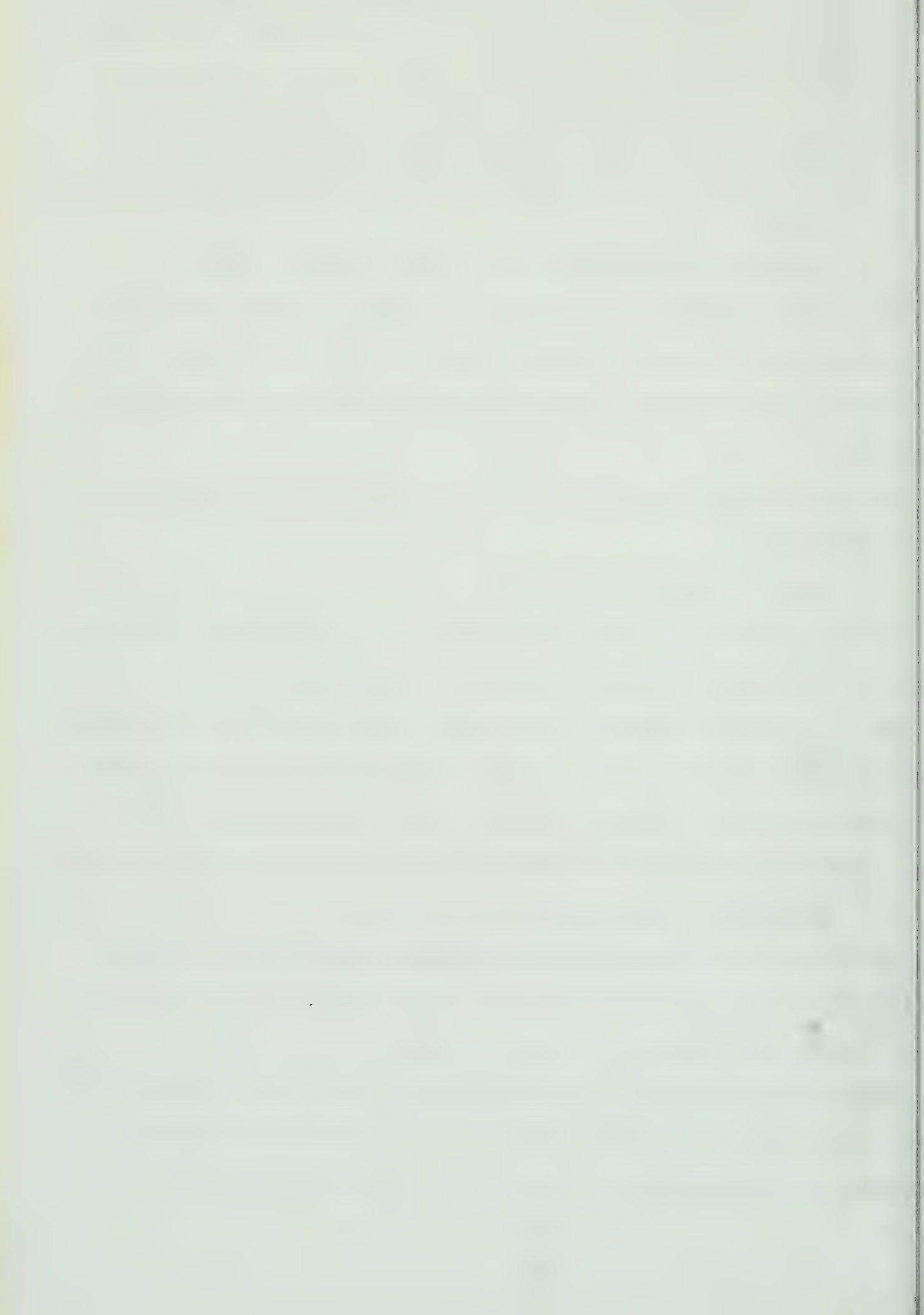
Normally waiver is made by Counsel as to particular witnesses, since as every trial lawyer knows, it is just as . . .

As a practical matter, a reviewing court cannot find a denial of the Constitutional right to cross examine merely on the basis of an error in trial tactics, unless such an error is so gross as to constitute a denial of adequate and effective aid of Counsel.

Brubaker v. Dickson, 310 F. 2d 30

But there is a vast difference between questions of trial tactics and the complete submission of the issue of guilt or innocence on the cold record of a transcript.

Practically speaking, such submissions are often nothing more than a "slow plea of guilty" the waiver of cross examination by submission on a preliminary transcript must be made by the accused



Cruzado v. People of Puerto Rico, 210 F. 2d. 789

Suggesting a different conclusion is not controlling here in the light of:

Fay v. Noia, 372 U.S. 391.

The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458 - an intentional relinquishment or abandonment of a known right or privilege - furnishes the controlling standard.

Price v. Johnston, 334 U.S. 266, 291.

At all events we wish it clearly understood that the standard here put forth on the considered choice of petitioner.

Carnley v. Cochran, 369 U.S. 506

Moore v. Michigan, 355 U.S. 155

As to information No. 297919, on the sales charge.

POINT I

Insufficiency of the evidence, and lack of proof that the alleged evidence was not subject to being tampered with.

The record before us discloses that the police officer is the sole witness testifying to the alleged sale.

Sec. 1846 et subs. of the Code of Civil Procedure distinctly stipulates that:

"The testimony of one witness who is entitled to full credit shall be sufficient to warrant a conviction."

It is of ut most importance to note that the code, does not state ". . .one witness," but one witness who is entitled to full credit.

at the officer's testimony in this case commands.

Aside from the fact that he is an officer of the law, his testimony as pertains to your petitioner is confused and even the police chemist admits that the evidence was tampered with.

In Brubaker v. Dickson, 310 F. 2d. 30, 38, the Court held:

"That often the critical factual inquiry relates to matters outside of the trial record."

The instant case presents just such a situation.

Five defendant's were tried jointly allegedly selling narcotics. One of them, Francisco Lopez, was the informer.

The record establishes that he received county money for his information in addition to leniency in his sentence.

In Willson v. Superior Court, 46 Cal. 2d. 291, the Court held:

"The reliability of the informer goes to the very heart of the concept of reasonable cause."

Accordingly to justify reliance on the information received is now firmly established in this State that the information must come from a reliable informant.

People v. Prewitt, 52 Cal. 2d. 330, 337

Willson v. Superior Court, supra

People v. Roland, 183 Cal. App. 2d. 780, 784

People v. Amos, 181 Cal. App. 506, 508

People v. Dawson, 150 Cal. App. 2d. 119, 126

Ovalle v. Superior Court, 202 Cal. App. 2d. 760

People v. Williams, 196 Cal. App. 2d. 345

People v. Bates, 163 Cal. App. 2d. 347, 351.



harrassed for the last 2 years by the police, for alleged narcotics dealings invariably he was searched, both his person and home without a warrant and found to be "clean."

The record further discloses that petitioner was known to associate with addicts and narcotic dealers.

However, in People v. Lanzitt, 70 C.A. 498, 233 p. 816, the Court held:

"It is necessary that the defendant shall have directly participated in so much of the entire transaction that the acts which he himself committed shall alone be sufficient to make a complete offense against the law."

The officers failed to equivocally establish that the evidence introduced in Court was obtained from the petitioner.

Quite contrary, were it not for all the circumstantial evidence tending to portray petitioner as a notorious narcotic dealer, no conviction could have been had on the adduced evidence.

POINT II

Ineffective aid of Counsel.

"It is now established that the Sixth Amendment guarantee of right to counsel, is a right fundamental and essential to a fair trial and is made obligatory on the States by the Fourteenth Amendment."

Gideon v. Wainwright, 372 U.S. 359.

"Moreover, effective assistance of Counsel at all stages of a State Court proceedings is a constitutional requirement which no State may disregard."

Reece v. State of Georgia, 350 U.S. 85.

The reason as Mr. Justice Sutherland so wisely pointed out, in:

Powell v. Alabama, 287 U.S. 45, p. 69.

"... lacks even a single adequate opportunity to prepare his defense, even though he is a perfect one. He requires the guiding hand of experienced counsel at every step of the proceeding against him."

and in: Armstrong v. Times, 131 F. 2d. 827, the Court held:

"Even though an accused in a criminal trial is represented by a coterie of outstanding trial lawyers, such representation may lack viatly in satisfying "Due Process" if the assistance of counsel is ineffective."

and in: Brubaker v. Dickson, supra:

"When inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside of the trial record, whether the defendant had a defense (1.) which was not presented, (2.) whether the omissions charged to trial counsel resulted from inadequate preparation, . . .

and in: Powell v. Alabama, supra:

People v. Avilez, 86 Cal. App. 2d. 289, 294

People v. Chesser, 29 Cal. 2d. 815

it was held that:

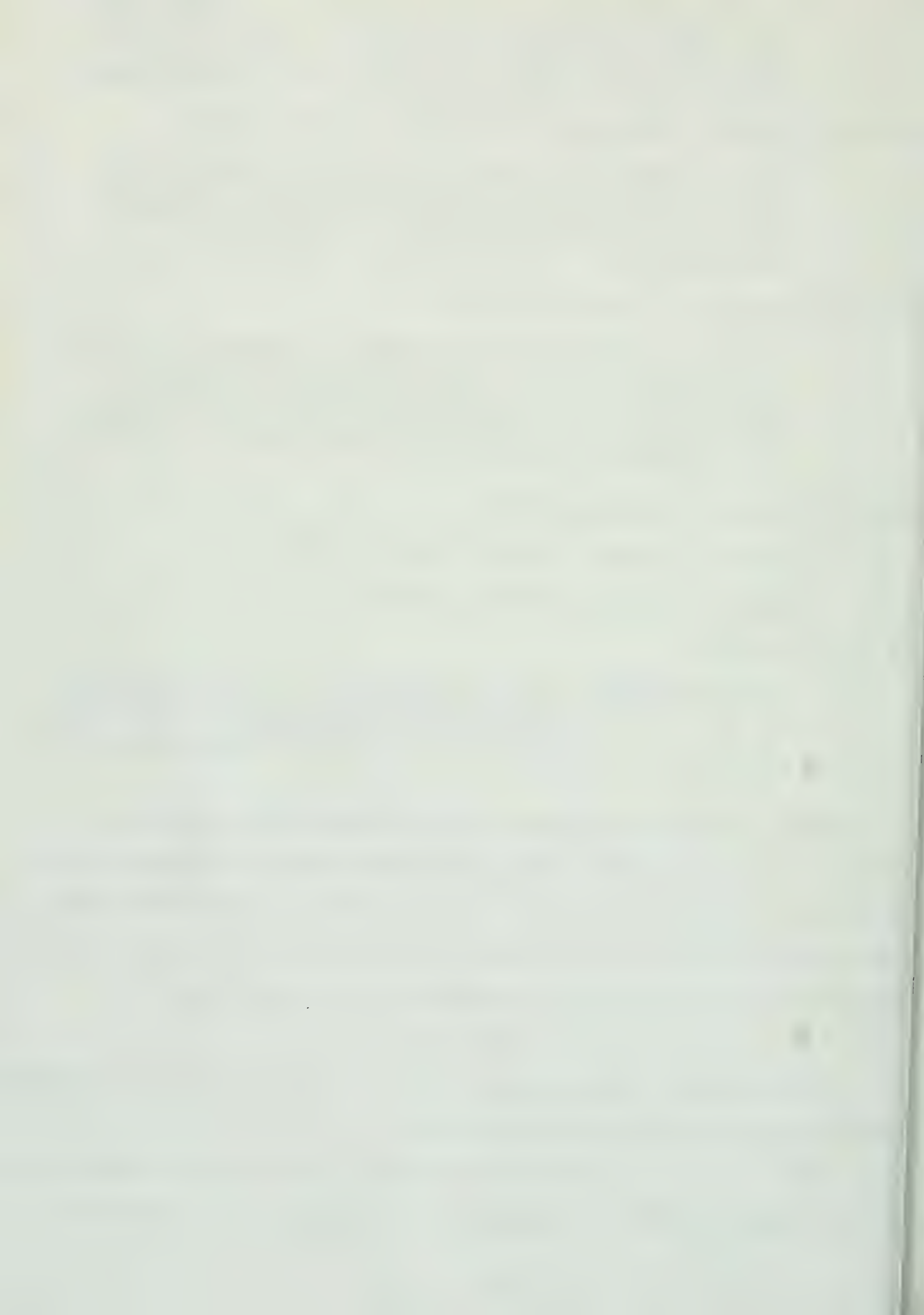
"The protection guaranteed by the Sixth and Fourteenth Amendments of Federal Constitution, as well as Article I, Sec. 13, of the California Constitution is not satisfied by a "mere token" or "pro forma" appearance of an attorney.

While it will be conceded that as whole defense counsel defended the case rather well, she grossly erred in allowing your petitioner to be tried jointly with his other co-defendants when the various counts of the information, charged distinct and separate offenses not related to one another in any was or form.

POINT III

The conspiracy charge is unproven and the evidence was obtained with the aid of an unreliable informer.

Count VI of the information charges 7 overt acts of conspiracy, of which the 3rd, 6th and 7th, are pertaining to your petitioner.



In substance they charge:

"Did meet and they had a conversation."

"Did meet and they had a conversation."

"Did leave the 700 Block of East 12th St. in a motor vehicle and returned in the vehicle 15 minutes later."

It is respectfully submitted that we need not argue that:

"No person may be subjected to be tried for committing a crime, without a specific charge against him, be made and substantiated "

In the instant case, while the charge of conspiracy was made, it is clearly established that the wording of the information does not charge a specific offense, since there is no crime for friends or acquaintances, to meet, hold a conversation or take a ride in a motor vehicle together.

The prosecution unquestionably depends on the information obtained from the informer.

Only recently the California District Court of Appeal District One, People v. Cedeno, 218 A.C.A. 229, the Court held:

"There is no exact formula for the determination of reasonableness each case must be decided on its own facts and circumstances."

People v. Ingle, 53 Cal. 2d. 407

People v. Diggs, 161 Cal. App. 2d. 167, 171.

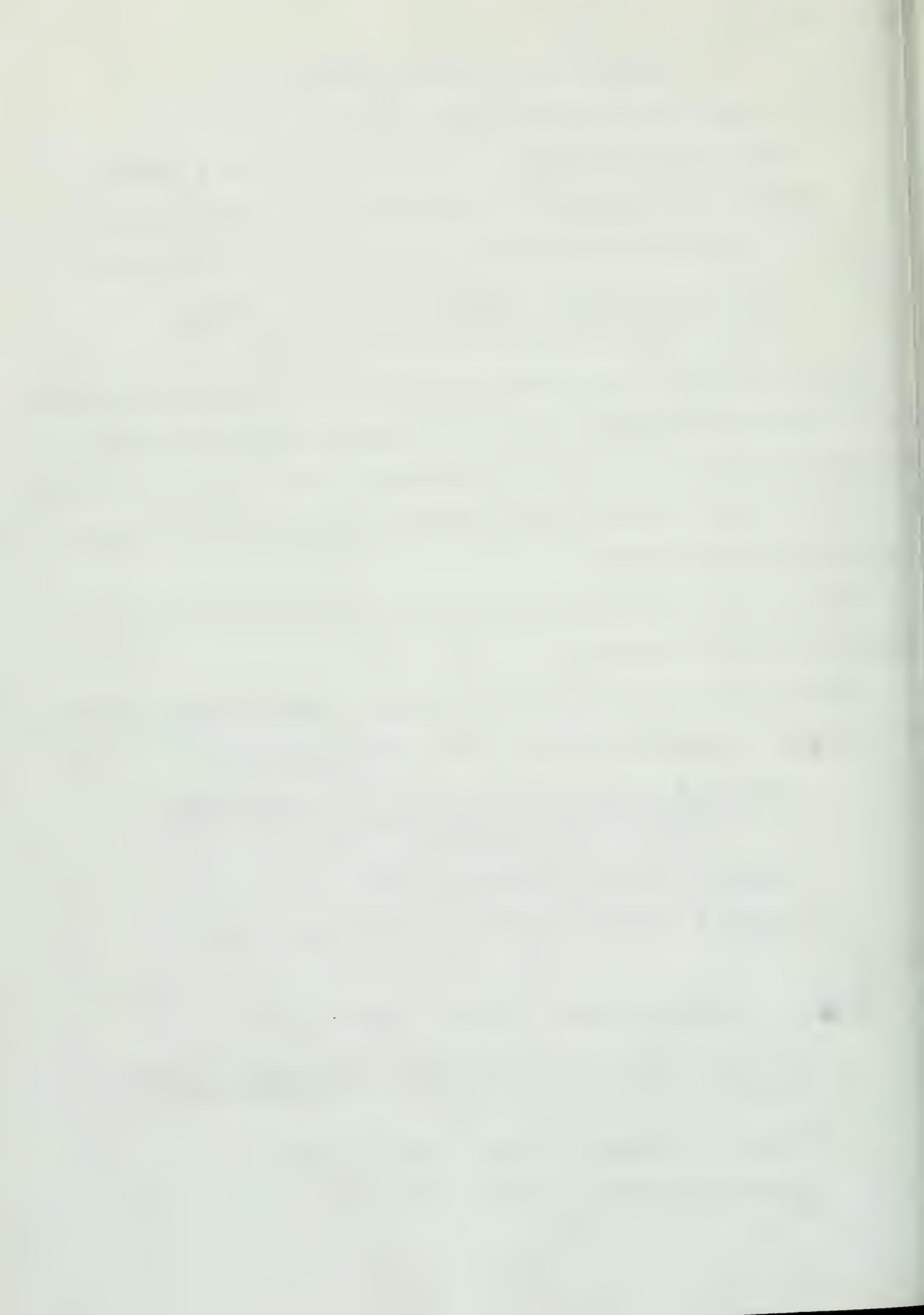
and in:

Ovalle v. Superior Court, 202 Cal. App. 2d. 760

"The qualification of the information, given by the informer does not rise above its doubtful source, because there is more of it."

People v. Vepazo, 191 Cal. App. 2d. 666

People v. Blodgett, 46 Cal. 2d. 114



People v. Escobedo, 165 Cal. App. 2d. 597

People v. Poole, 174 Cal. App. 2d. 57

People v. McMurray, 171 Cal. App. 2d. 178

POINT IV

Evidence obtained by interrogation without Counsel.

The record clearly establishes that immediately following the arrest, on or about April 12, 1961, petitioner was taken to the State Building for interrogation without counsel, by the arresting officers and while arrested petitioner allegedly made some statements to the officers and petitioner was not advised by the officer to have counsel present and the right to remain silent.

Escobedo v. State of Illinois, U.S. Supreme Court No. 615,

October Term 1963, the Court held:

"It is well settled that the duty of Constitutional adjudication, resting upon this Court requires that the question whether the "Due Process Clause of the 14th Amendment has been violated by admission into evidence of a coerced confession."

Ashcraft v. Tennessee, 322 U.S. 143

and we cannot escape the responsibility of making our own examination of the record.

Spano v. United States, 360 U.S. 315

and cases cited on page 16-20, on POINT II,

and in Gideon v. Wainwright, 372 U.S. 335, 344, 345. the Court held:

That provision of counsel in all criminal cases was "a fundamental right essential to a fair trial," and thus was made obligatory on the States by the Fourteenth Amendment.

CONCLUSIONS

The Writ shall issue, a full evidentiary hearing granted and Counsel appointed.

Dated at Tamal, California, this 9th day of December, 1964.

I certify under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Alberto Gonzalez Barquera Jr.
ALBERTO GONZALES BARQUERA JR.
In Propria Persona
Box No. A-67294
Tamal, California



STATE OF CALIFORNIA)
COUNTY OF MARIN)
_____)

ss: AFFIDAVIT IN FORMA PAUPERIS

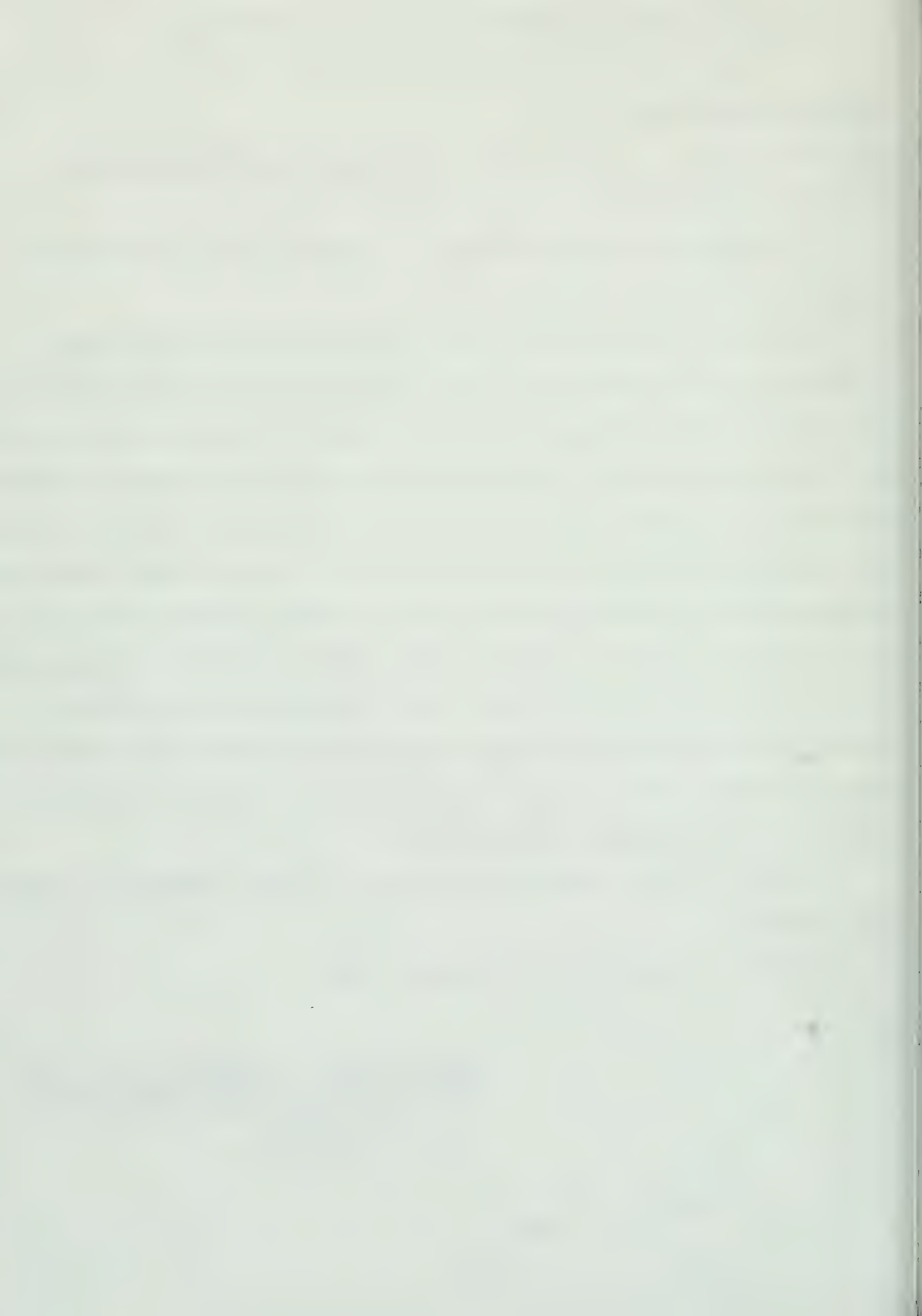
I, ALBERTO GONZALES BARQUERA JR., under penalty of perjury, deposes and says:

That he is the affiant in the above-entitled matter, that affiant is an indigent person, and a citizen of the United States and over 21 years of age, that he is unable to prepay the fees or to file a petition for a Writ of Habeas Corpus and papers in support thereof, or to hire counsel to prosecute said writ, that he is without funds or anything of value with which to pay or secure the cost necessary to prosecute said writ, that affiant believes this is a good and just cause of action, and he therefore prays this Honorable Court will permit him to proceed with a petition for a Writ of Habeas Corpus without prepaying the costs required by this Honorable Court in such cases, and that the security for same be waived by virtue of his indigent circumstances.

I certify under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of December, 1964.

Alberto Gonzales Barquera Jr.
ALBERTO GONZALES BARQUERA JR.
Box No. A-87294
Temal, California



IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATE OF CALIFORNIA)

COUNTY OF MARTIN)

ss: AFFIDAVIT OF VERIFICATION

I, ALBERTO GONZALES BARQUERA JR., under penalty of perjury,
deposes and says:

That he is the petitioner in the foregoing petition for a
Writ of Habeas Corpus, and the affiant in the above-entitled
matter, that he is a citizen of the United States and over 21
years of age, that the statements and claims therein are true
and correct to the best of his knowledge and belief and can be
substantiated by documents or established precedents, that this
petition for a Writ of Habeas Corpus, consists of 34 numbered pages,
including:

The Cover (not numbered)

Index of Statutes and Authorities

The petition for writ of habeas corpus

Affidavit in forma pauperis

Affidavit of Verification, and

Affidavit of Service by Mail.

I certify under penalty of perjury that the foregoing is true
and correct.

Dated this 9th day of December, 1964.

Alberto Gonzales Barquera Jr.
ALBERTO GONZALES BARQUERA JR.
Box No. A-67294
Tamal, California



STATE OF CALIFORNIA)

COUNTY OF MARIN)

ss: AFFIDAVIT OF SERVICE BY MAIL

I, ALBERTO GONZALES BARQUERA JR., under penalty of perjury, deposes and says:

That I am over the age of 21 years, a citizen of the United States and a resident of Marin County, at San Quentin, California, and sole party to the within action or proceeding, that I did on the 9th day of December, 1964, submit for depositing in the United States Mails at the Post Office at San Quentin with postage pre-paid thereon, a true copy(s) of the within document for the following person(s), and that there is a regular communication by mail between ^oSan Quentin and these destinations:

Eleven (11) copies to:

William I. Sullivan, Clerk,
Supreme Court of the
State of California
4250 State Building
San Francisco, California

One (1) copy to:

Thomas C. Lynch, California
Attorney General
6000 State Building
San Francisco, California

Three (3) copies to:

Superior Court Judge
County of Los Angeles
Hall of Justice
Los Angeles, California
RE: Case Nos. 292580 and 297919.

One (1) copy to:

Warden, Lawrence E. Wilson
San Quentin, California

One (1) copy to:

Petitioner

I certify under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of December, 1964.

Alberto Gonzales Barquera Jr.
ALBERTO GONZALES BARQUERA JR.

1 Q And when you looked at that balloon this
2 morning, did you see those markings on that balloon?

3 A Yes, sir.

4 MR. ROWEN: Now, that concludes the evidence
5 regarding Count II of the Information, your Honor.

6 THE COURT: All right, thank you.

7 MR. ROWEN: And also the evidence regarding Overt
8 Act No. 2.

9 THE COURT: All right.

10 MR. ROWEN: The officer is now about to start on
11 the evidence regarding Count III, regarding a tran-
12 saction between Salvador Gomez and Alberto Barquera,
13 Jr., as alleged in Count III of the Information, and
14 also it applies to the Overt Act No. 3 that is alleged
15 in Count VI of the Information.

16 THE COURT: Go ahead.

17 Q BY MR. ROWEN: Officer, directing your
18 attention to March 3, 1961, some time on that date
19 did you go back to the Texas Club?

20 A Yes, sir, I did.

21 Q At that time were there fellow officers with
22 you? Were you under surveillance?

23 A Yes, sir.

24 Q Who were the officers at that time?

25 A Agents Kent and Leavey, Agent Lampe.

26 Q Did you go into the Texas Club?

EXHIBIT 6

1 A No, sir.

2 Q What time of the day or night did you arrive
3 there?

4 A Approximately 1:40 p.m.

5 Q On that occasion did you meet the Defendant
6 Salvador Gomez?

7 A Yes, sir.

8 Q Where did you meet the Defendant Salvador
9 Gomez?

10 A In the parking lot at the rear of the Texas
11 bar.

12 Q Had you been there before 1:40 p.m.?

13 A No, sir.

14 Q All right. Tell us what happened on that
15 occasion?

16 A I parked the state vehicle on the 700 block
17 East 12th Street, which is adjacent to the parking
18 lot at the rear of the Texas Club; got out of the
19 state vehicle and walked to where Salvador Gomez was
20 standing in the parking lot.

21 I asked Salvador Gomez if he could get me a half
22 a piece and he said, "No, I don't have it."

23 I said, "Well, can you at least get me a quarter?"
24 And he said, "Yes."

25 Q Now, the phrase, "half a piece," what does
26 that mean?

1 A Half ounce measurement.

2 Q Half an ounce of heroin?

3 A Heroin.

4 Q All right. Then he said, "No." And you asked
5 him, "Could you at least get me a quarter"?

6 A I then asked him if he could at least get me
7 a quarter. He said, "Yes. Wait for Nolo."

8 Q And a quarter is what, a quarter ounce?

9 A Yes, sir.

10 Q What did he tell you after you asked him if
11 he could get you a quarter?

12 A He said, "Yes, but you'll have to wait for
13 Nolo. He'll be back in a minute."

14 I then told him I would wait in this car that I
15 was driving. And he said, "Okay. The Chevy over
16 there?" And I said, "Yes."

17 I returned to the state vehicle and entered it;
18 waited. Approximately five minutes later I observed
19 Alberto Barquera.

20 Q Do you see Alberto Barquera, Jr., in the
21 courtroom?

22 A Yes, sir.

23 Q And which is he?

24 A The defendant next to counsel.

25 Q Next to Mrs. Chandler?

26 A Yes.

1 MR. ROWEN: Mr. Alberto Barquera stand up.

2 Q Is that Alberto Barquera, Jr?

3 A Yes, sir.

4 MR. ROWEN: All right, you can sit down.

5 THE WITNESS: I observed Salvador Gomez and Alberto
6 Barquera conversing in the parking lot and looking in my
7 direction.

8 Q BY MR. ROWEN: All right. What happened then?

9 A Alberto Barquera by himself, walking by himself,
10 came towards the state vehicle, entered, sat in the front
11 seat. And he said, "Hi, Tony. How are you?"

12 Q Had you ever met Alberto Barquera before?

13 A Never.

14 Q Did he introduce himself by any name?

15 A I asked him, "Are you Nolo?" And he said,
16 "Yes, I am."

17 Q What happened then?

18 A He then directed me to drive into the alley.

19 Q Did you drive the car in the alley?

20 A Yes, sir. I proceeded south in the alley.

21 Q Was there any conversation while you drove
22 in the alley?

23 A Yes. He asked me, "Are you from El Paso?"
24 And I said, "No, I'm from La Puente right now."

25 He said, "How much do you want?" I said, "A quarter."
26 I asked him, "How much will it be?" And he said, "Seventy."

1 THE COURT: Seventy?

2 THE WITNESS: Seventy, yes.

3 Q BY MR. ROWEN: Seven oh?

4 A Seven oh.

5 Q All right, go ahead.

6 A At the south alley of the 700 block of Pico
7 Street, the south entrance to the alley, he asked for
8 the money. At this time I gave him \$70.00 from state
9 funds and he said, "Wait."

10 THE COURT: Now, let me get this straight. You
11 gave him \$70.00 for how much powder?

12 THE WITNESS: A quarter ounce.

13 THE COURT: One quarter ounce?

14 THE WITNESS: Yes, sir.

15 THE COURT: All right.

16 THE WITNESS: At this location he instructed me
17 to park. He got out of the state vehicle and I
18 observed him to walk where the storm drain is situated
19 at the corner of the building, and from a clump of
20 grass that was growing at this location he reached
21 down, retrieved a balloon, and came back to the state
22 vehicle. At this time he handed me a yellow colored
23 balloon.

24 Q BY MR. ROWEN: Did you take the balloon
25 into your possession?

26 A Yes, I took the balloon and I asked him --

1 counsel, and the interpreter are here?

2 MR. DUNCAN: So stipulated.

3 MRS. CHANDLER: So stipulated.

4 THE COURT: All right, go ahead.

5 Now we are on Count V and Overt Acts 6 and 7?

6 MR. ROWEN: That is correct.

7 Q Officer, directing your attention to March
8 21, 1961, did you some time on that day go back to
9 the Texas Club?

10 A Yes, sir, I did.

11 Q What time did you first go there?

12 A Oh, approximately 5 after 2:00, 2:00 o'clock,
13 2:00 p.m.

14 Q And when you went back to the Texas Club on
15 March 21, 1961, did you meet or see the Defendant
16 Salvador Gomez?

17 A Yes, sir, I did.

18 Q All right. And did you talk with him then?

19 A Yes, sir, I did.

20 Q First of all, where did you meet him?

21 A He was the occupant in a vehicle that pulled
22 up parallel to the -- pulled up alongside the state
23 vehicle that I had parked on the 700 block east Pico.

24 Q Now, were you under surveillance by fellow
25 members of the State Narcotic Bureau at that time?

26 A Yes.

1 Q And who were they?

2 A They were Agents Wells, Kent, Leavey, Narro.

3 Q And you were parked on 12th Street, 7th Street--
4 where were you parked?

5 A 700 block East 12th Street -- no -- yes, yes.

6 Q All right. And were you in a state police
7 car, were you?

8 A Yes, sir.

9 Q State vehicle. And just to repeat, now, the
10 Defendant Salvador Gomez drove up in a car?

11 A Yes, sir.

12 Q Was he in an automobile by himself or were
13 there others in the car?

14 A There were others in the car.

15 Q And how many others were there in the car?

16 A One.

17 Q Was it a man or a woman?

18 A A man.

19 Q Do you see that person in the courtroom
20 today?

21 A Yes.

22 Q Who is that?

23 A Alberto Barquera, Jr.

24 Q Known to you as "Nolo," too?

25 A Yes, sir.

26 Q What happened at this occasion?

1 A Well, Alberto Barquera, Jr., was driving,
2 Salvador Gomez was a passenger in the front seat. They
3 pulled up alongside of me. Salvador asked me, "What
4 do you want?"

5 THE COURT: Wait a minute. You pulled up along-
6 side of whom?

7 THE WITNESS: They pulled up alongside of me on
8 the 700 block of 12th Street.

9 THE COURT: All right. Now, who pulled up?

10 THE WITNESS: Salvador Gomez and Alberto Barquera.

11 THE COURT: All right.

12 THE WITNESS: Alberto Barquera was driving. They
13 pulled up alongside the state vehicle, and Salvador
14 Gomez asked me, "What do you want?" And I said, "A
15 quarter." And he said, "Okay, wait here."

16 Q BY MR. ROWEN: Who said, "Okay, wait here"?

17 A Salvador Gomez.

18 Q Told you to wait there?

19 A Yes.

20 Q Did Gomez get out of the car when he asked
21 you what you wanted?

22 A No.

23 Q After you told him "A quarter," he told you
24 to "Wait here," was he out of the car then or was he
25 still in the car?

26 A No. They were both in the vehicle.

1 Q Were you in your car?

2 A No, I was on the street.

3 Q When you say "on the street --"

4 A I was standing on the street.

5 Q All right. After they told you to "wait here,"
6 what did they do then?

7 A They drove away heading south in the alley.

8 Oh, approximately 10, 15 minutes later the car
9 returned and parked on the 700 block of 12th Street
10 next to San Pedro, 700 block East.

11 MR. ROWEN: All right. Now, just a moment. I
12 want to direct the Court's attention to Overt Act No. 6.

13 THE COURT: Yes.

14 MR. ROWEN: Now, the officer has testified to
15 the circumstances regarding Overt Act No. 6; that is,
16 the conversation between Alberto Barquera, Jr., and
17 Salvador Gomez.

18 THE COURT: All right.

19 MR. ROWEN: And the officer has just testified
20 to the Overt Act No. 7; that is, that Alberto Barquera,
21 Jr., and Salvador Gomez did leave the 700 block of
22 East 12th Street in a motor vehicle and return to the
23 location later, 15 minutes later. So we have taken
24 all of the Overt Acts alleged in Count VI, your Honor.

25 THE COURT: All right.

26 Q BY MR. ROWEN: Now, after they returned in

1 the car, where did they park?

2 A They parked on the 700 block East 12th Street
3 next to San Pedro.

4 Q Where were you at that time?

5 A I was still in the state vehicle, which was
6 parked further east.

7 Q Okay. And then what happened?

8 A Upon parking their vehicle, Salvador Gomez
9 and Alberto Barquera got out of their vehicle.

10 Q They both got out of their car?

11 A Yes.

12 Q Then what did they do?

13 A Both entered the Texas bar through the front
14 door.

15 Q Okay. What did you do?

16 A I remained in the state vehicle. Shortly
17 afterward, Salvador Gomez comes out to the rear door.

18 Q The rear door of the Texas bar?

19 A Of the Texas bar. And motions for me to
20 join him.

21 Q Did you get out of your car then?

22 A Yes, I did.

23 Q Did you go into the Texas bar?

24 A No, I met him at the rear doorway.

25 Q Who did you meet at the rear doorway?

26 A Salvador Gomez.

1 Q Did you have a conversation with Salvador Gomez
2 at that time?

3 A Yes.

4 Q What was said?

5 A He said, "Go into the women's toilet; Nolo
6 is there."

7 Q All right. What did you say?

8 A I said, "Okay." I walked into the women's
9 restroom.

10 Q Inside the Texas bar?

11 A Yes, sir.

12 Q All right. Tell us what happened inside.

13 A Alberto Barqueras was inside. He met me at
14 the door. At this time he said, "Have you got the
15 money?" I said, "Yes." I said, "How much is it?"
16 He said, "Seventy."

17 He then handed me a balloon and I handed him
18 \$70.00 from state funds.

19 Q Was there any conversation?

20 A Yes.

21 Q Tell us about that.

22 A I asked him if I could still get the five
23 pieces, and he said, "Yes, whenever you are ready,
24 just bring the money in. We can do it."

25 Q What else?

26 A I told him that I would see about it.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appellants,

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED

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WM. B. LUCK, CLERK

EDWIN L. MILLER, JR.,
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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United States Attorney,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in a one-count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.



II

STATEMENT OF THE CASE

Appellants were tried under the one-count indictment which alleged that appellant Lewis knowingly concealed, and facilitated the transportation and concealment of, approximately six ounces of cocaine and one ounce of heroin, narcotic drugs, which, as he then and there well knew, had been imported and brought into the United States contrary to law. The indictment also alleged that appellant Lee knowingly aided, abetted, assisted, counseled, induced and procured the commission of that offense [C. T. 2]. 1/

Jury trial of appellants commenced on February 1, 1966, before United States District Judge James M. Carter [R. T. 2]. 2/ Appellants were found guilty as charged on February 2, 1966 [R. T. 218-19].

Thereafter, on March 7, 1966, appellant Lee was committed to the custody of the Attorney General for treatment and supervision as a Youth Offender, until discharged by the Board of Parole. Appellant Lewis was sentenced to seven years in prison on the same date [C. T. 15-16].

Appellants thereafter filed timely notices of appeal [C. T. 17-18].

1/ "C. T. " refers to the Clerk's Transcript of Record.

2/ "R. T. " refers to the Reporter's Transcript. The Reporter's Transcript of proceedings at the hearing on Motion to Suppress Evidence will be separately designated.



III

ERROR SPECIFIED

Appellants specify the following points upon appeal:

1. Alleged error in the ruling that appellant Lee had no standing to object to a search.
2. Alleged insufficiency of the evidence as to Lee.
3. Alleged error in denying appellant Lewis's Motion to Suppress Evidence.

IV

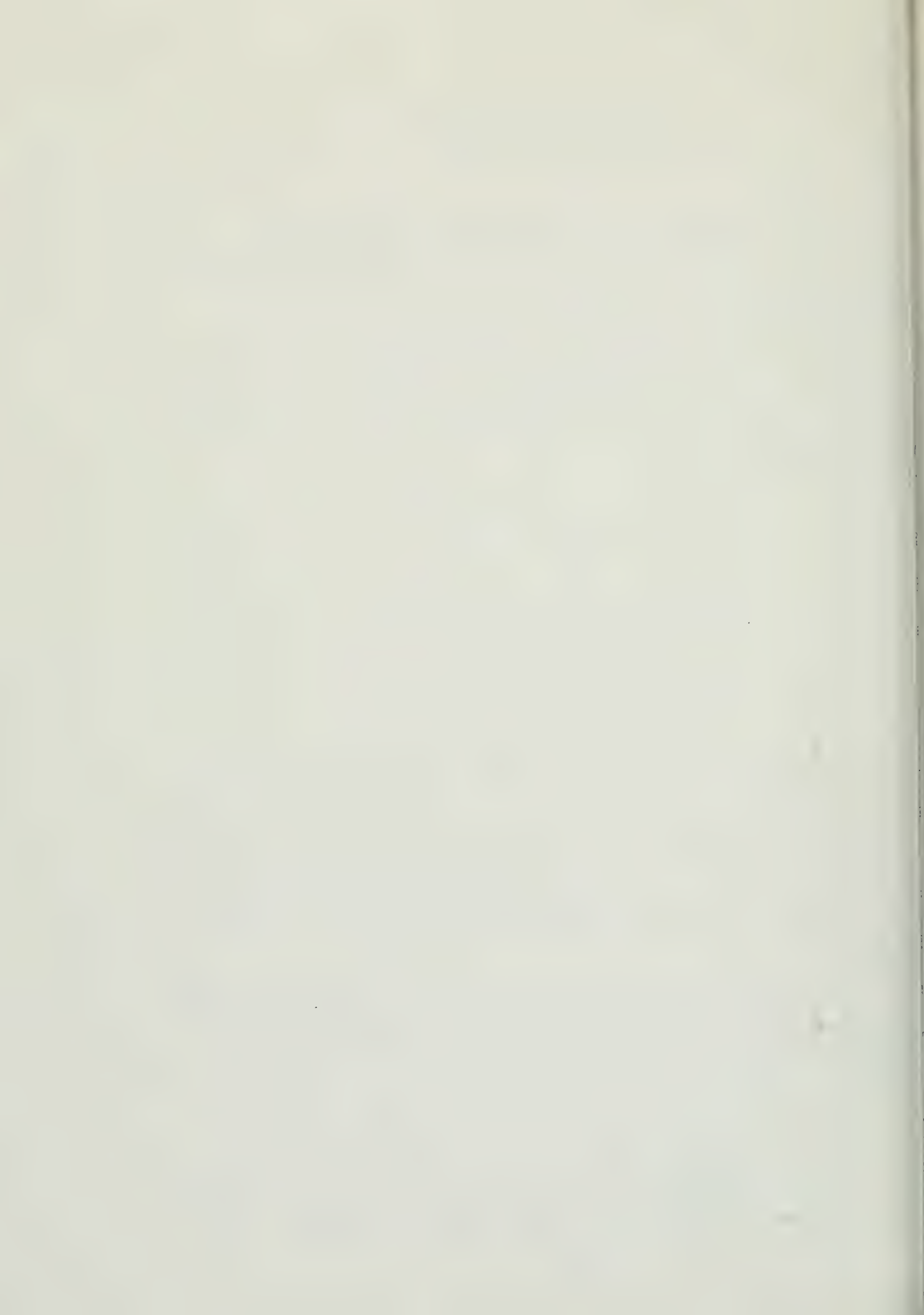
STATEMENT OF THE FACTS

A. The Motion to Suppress Evidence.

On October 8, 1965, United States Customs Agent Thaine Ellis was informed by Leobardo Sandoval that a 1955 Ford bearing California license GNP 408 would be used to transport a quantity of narcotics into the United States from Mexico [M. S. 18-19, 21, 23-24]. ^{3/}

Sandoval had been very reliable as an informant in the past and had provided information resulting in arrests upon three separate occasions:

^{3/} "M. S. " refers to the Reporter's Transcript of Proceedings at the hearing of the Motion to Suppress Evidence.



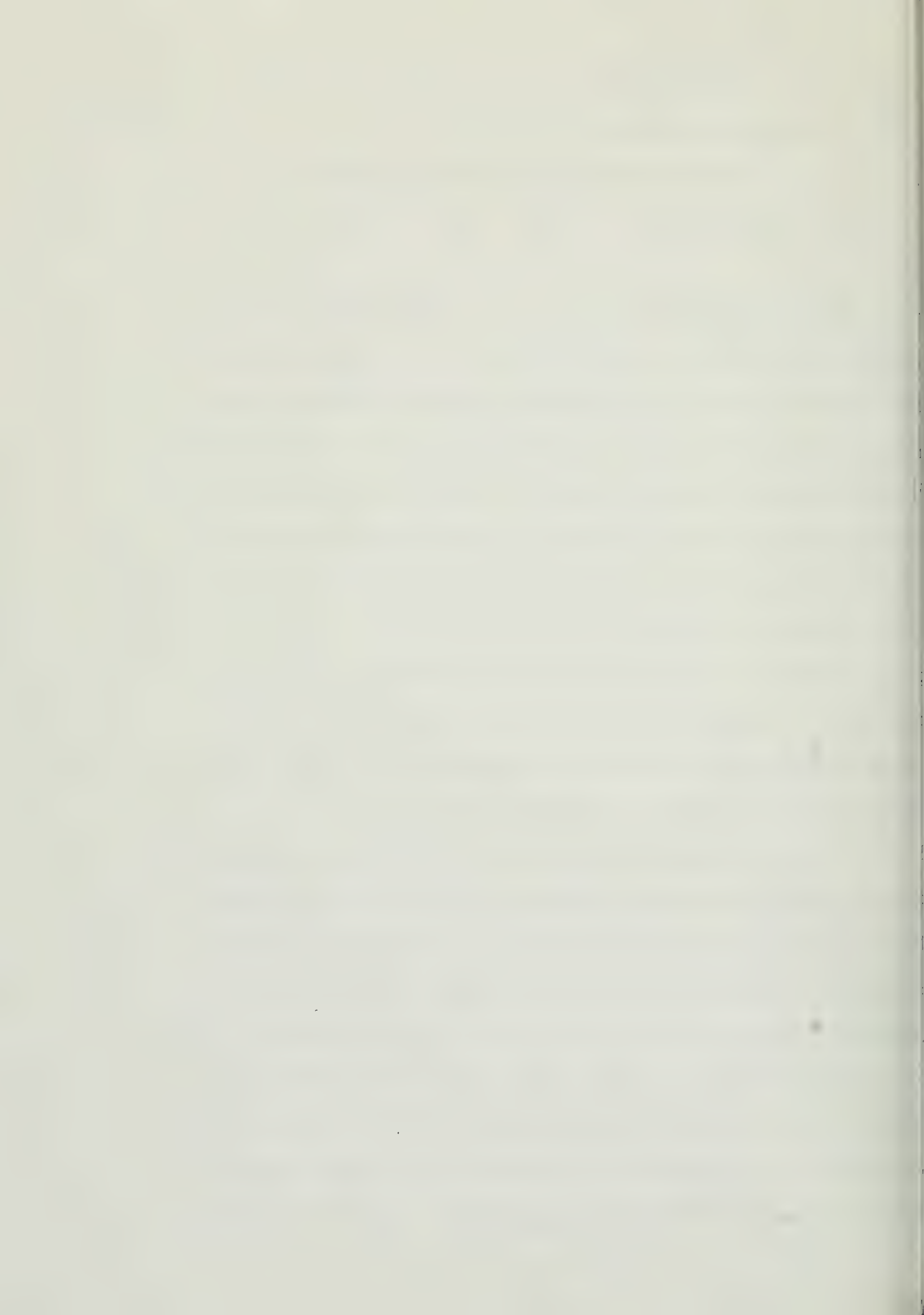
"THE COURT: The information given on these occasions checked out?

"THE WITNESS: Right down to the line, yes, sir." [M. S. 31].

On the following day, October 9, Sandoval informed Ellis that the vehicle would cross the line after 10 o'clock in the morning. At about 11:45 on the same date Ellis was informed by an officer at the port of entry that he had stopped the vehicle and sent it to the secondary inspection area. Ellis ordered that there be no search in the secondary area and also asked Supervisory Customs Port Investigator Gore to follow the vehicle when it left the secondary area [M. S. '19-20, 24].

Ellis was in radio communication with Gore as the latter followed the vehicle. Gore informed him that he, Gore, was being followed by a 1963 Buick with Nevada license plates. He gave the license number to Ellis [M. S. 20].

Ellis subsequently observed the 1955 Ford and talked to the driver, who was Sandoval. Sandoval advised Ellis that he, Sandoval, was to park the Ford at Ocean View and (Ellis believed) 45th. Sandoval said that he was instructed to leave the keys in the ashtray, leave the vehicle, and proceed to a distance approximately two or three blocks away, from which point he could observe the vehicle. Sandoval had been instructed to wait, that someone would pick up the vehicle and return it about an hour later, and that it would be left in order that he could return in the vehicle to Mexico



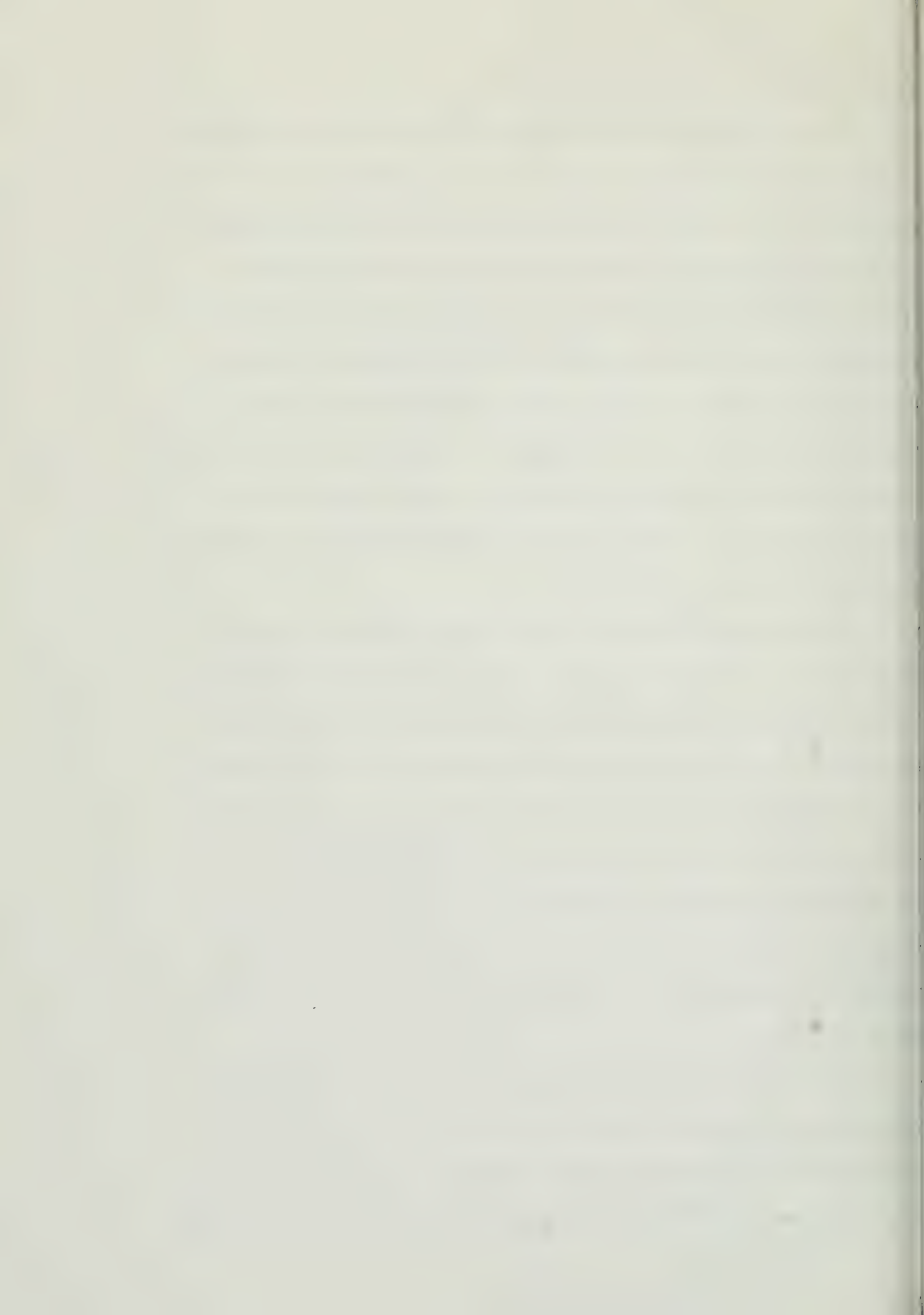
[M. S. 21-23].

Customs Agent Paul Samaduroff subsequently observed the Ford parked on Ocean View by 45th Street. This was on the same date [M. S. 5-7]. Samaduroff had been informed by Ellis that he had good information (or words to that effect) that there were narcotics in the Ford, and he had been told about the Buick following some distance behind the Ford. He was informed by radio that the same Buick was in the area of 45th and Ocean View. Samaduroff observed a male walking from the Buick toward Ocean View. Samaduroff parked elsewhere and was informed that the man walking from the Buick had entered the Ford and had proceeded up Ocean View [M. S. 6-9, 13].

Samaduroff followed the Ford, which parked in front of a grocery store at Logan and 45th. Ellis, who saw the Buick leave the area, instructed Samaduroff "to pick up the '55 Ford with occupant". Ellis was in charge of the case [M. S. 9, 13, 27-28].

Ellis then arrested appellant Lewis, who was alone in the Ford and was seated in the driver's seat. The original driver of the Ford had previously left [M. S. 11, 15-17]. Ellis stopped the Buick on another street. Appellant Lee was the occupant of the Buick. No contraband was found in the search of that vehicle [M. S. 28, 30].

The arrest of Lewis occurred approximately 30 minutes after Ellis saw Sandoval [M. S. 27]. The Ford was moved to the Customs office immediately after the arrest. Then it was moved to a service station, there being no facilities at the Customs office

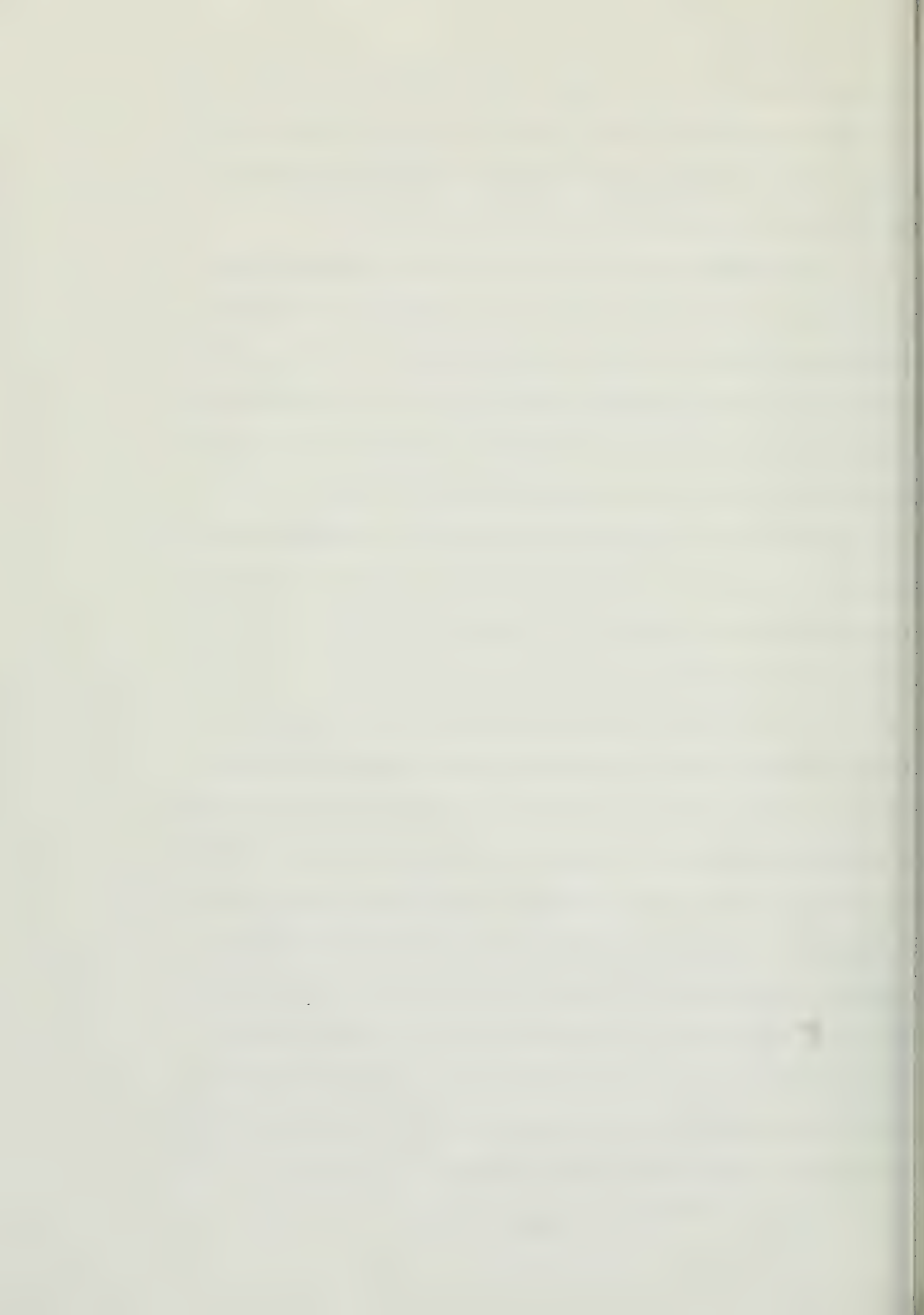


for thorough search of the vehicle. Such facilities also were lacking at the scene of the arrest. The officers did not know the exact location of the narcotics in the vehicle. A hoist was needed in order to lift the vehicle [R. T. 117-18; M. S. 12].

It took fifteen minutes to move the Ford from the scene of the arrest to the Customs office. It remained there for five minutes, and it took a couple of minutes to move it to the service station. The search consumed the remainder of the approximately two hours that elapsed between the time of arrest and the time of the discovery of the evidence in question [R. T. 118].

The officers found seven contraceptives, containing what appeared to be narcotics, under the window moulding on the right-hand door and the left-hand door. There was no search warrant [M. S. 12-15; R. T. 48].

The trial Court held that there was probable cause to arrest appellants; that the informant was a reliable informant; that it was reasonable and proper to move the Ford to the Customs office and also reasonable to move it to a service station before the search occurred; that the search was conducted as promptly as it could be conducted; and that the search occurred within a reasonable time after the arrest [R. T. 119; M. S. 39-40]. The trial Court also held that it was impractical to secure a search warrant before Lewis was arrested; that Samaduroff was acting under the directions of Ellis; and that Lee had no standing to object to the search [R. T. 120-21; M. S. 39-40].



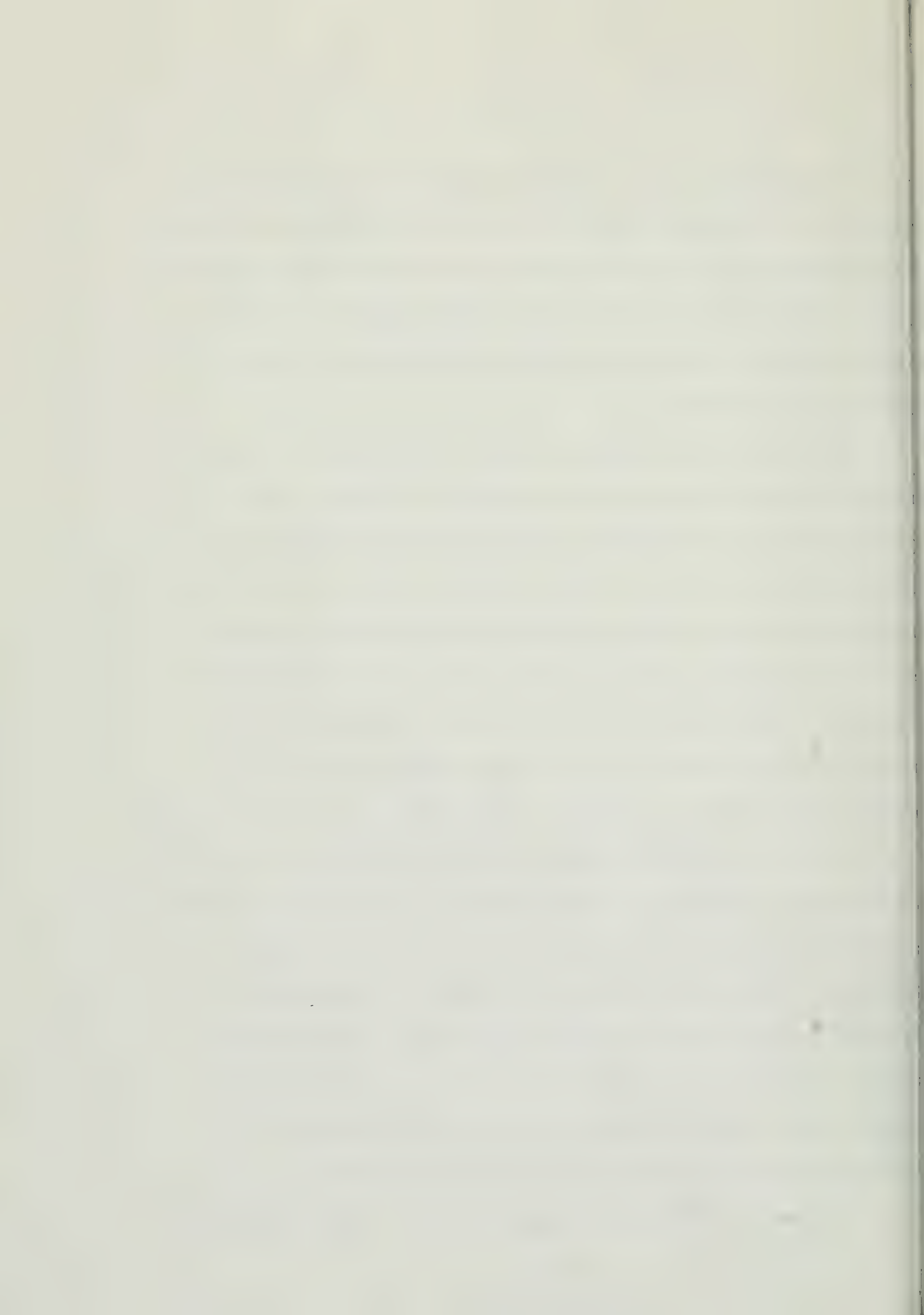
B. The Trial

On October 8, 1965, Leobardo Sandoval told Customs Agent Thaine Ellis that a narcotics dealer named Tino in Tijuana, Mexico, had offered to pay him \$50 for driving an automobile into the United States. Sandoval had provided reliable information in narcotics cases in the past. In each case the information had proved to be true [R. T. 77, 93-95].

The usual smuggling procedure in cases of this nature involved an advance payment for the narcotics in Mexico by the American buyer, with another person being hired to drive the vehicle across the border and leave it on the American side. The purchaser would pick up the vehicle and the narcotics. In other cases, the Mexican narcotics peddler would conceal the narcotics in an inexpensive vehicle and hire someone, usually a Mexican citizen, to drive the vehicle across the border, leave it for an hour, and then return it to Mexico [R. T. 103].

A 1955 Ford station wagon arrived from Tijuana, Mexico, at San Ysidro, California, at approximately 11:45 a. m. on October 9, 1965 [R. T. 22-23, 25]. The Mexican who was driving the vehicle declared no merchandise [R. T. 23, 26]. Agent Ellis directed that the vehicle be sent through without a thorough inspection [R. T. 96]. When searched later in the day, the Ford station wagon contained approximately six ounces of cocaine and three-fourths of an ounce of heroin [R. T. 18-21, 61, 65-66].

Customs Port Investigator George Gore followed the Ford



in an unmarked vehicle as the Ford left the port of entry. The vehicles proceeded from Highway 101 to U.S. Highway 101 Alternate and on the latter road to an intersection in Otay. At that point Gore reached the conclusion that a third vehicle was following the Ford and his own vehicle. He advised Agent Ellis of this conclusion by radio. The third vehicle, a black Buick with Nevada license plates, contained one male and one female. Gore subsequently noted the license number and gave it to Ellis [R. T. 26-30].

The Ford and Buick both turned left on Main Street and proceeded to the west. Both vehicles turned right from Main Street and proceeded on Broadway. The Ford turned right on Moss Street in Chula Vista. The Buick continued for one block, made a left turn and a U-turn, and ended up on Moss Street. The distance from the port of entry to Moss Street was about 6-1/2 miles. The Buick had first been observed behind the Ford and Gore's vehicle at a point about one or one and one-half miles from the port of entry [R. T. 28-30, 36, 50].

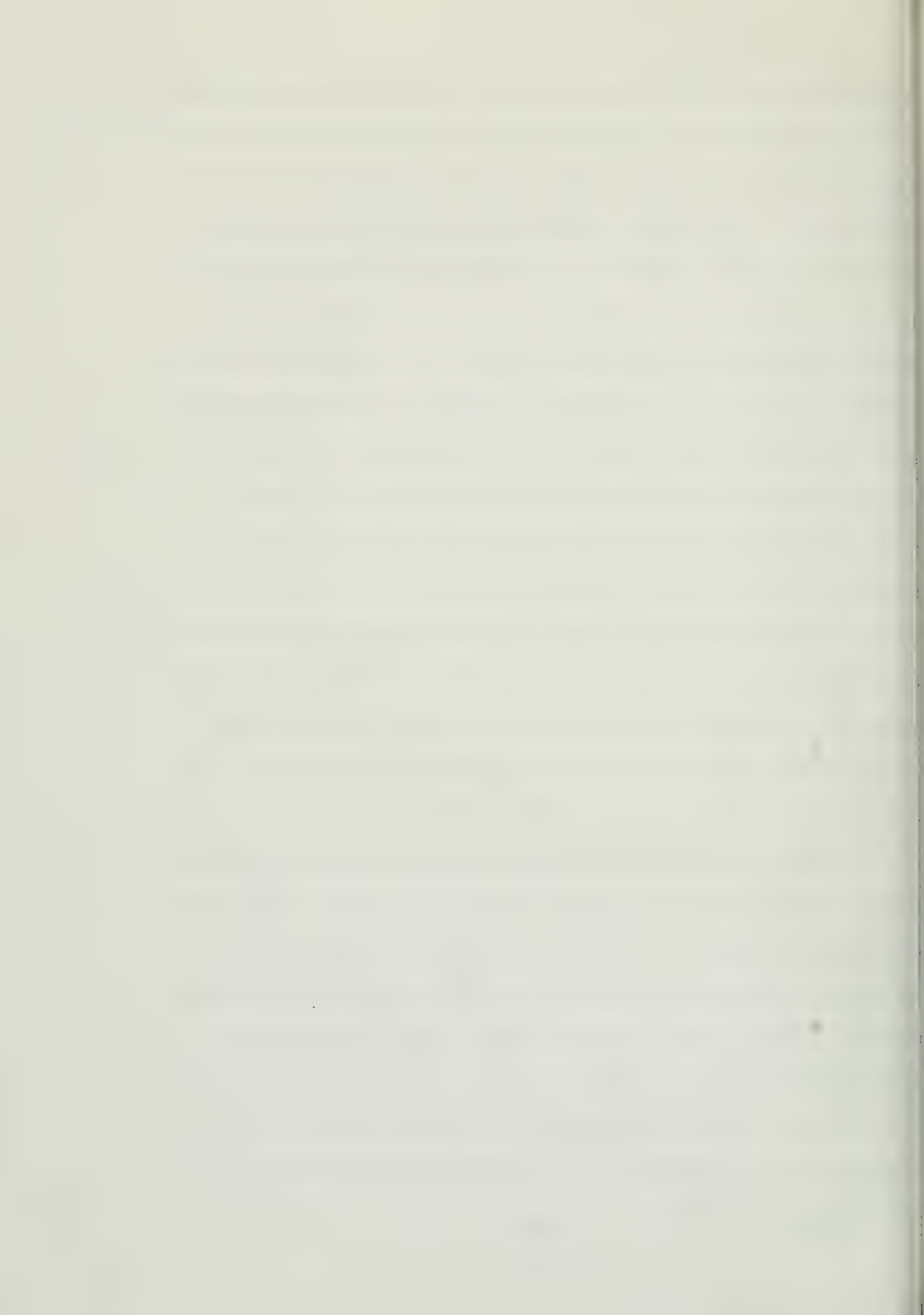
Agent Ellis had observed the Ford near Moss and Broadway, had recognized the driver, Sandoval, and had waved to him to turn on Moss. Ellis talked to Sandoval and told him to turn off Moss and remain out of sight for a few minutes. Ellis subsequently observed a black Buick turn onto Moss Street from Broadway [R. T. 78-79].

After various driving maneuvers Ellis met Sandoval again, the Ford driven by Sandoval was parked in a garage in Chula Vista, and various agents and Sandoval had a meeting at that point at

approximately 12:30. Sandoval told Ellis that he had been propositioned to take the Ford to 45th and Ocean View Avenue in the Logan Heights area of San Diego. Ellis told him to drive the Ford to that location [R. T. 50, 78, 81]. Sandoval drove to 45th and Ocean View, parked the vehicle at that location, and left the vehicle [R. T. 61, 81-83]. In order to reach 45th and Ocean View, Sandoval had driven to Broadway, turned right, went to "H" Street in Chula Vista, turned left, took the 101 Freeway to Wabash, went from Wabash to Ocean View, and turned right on Ocean View [R. T. 61, 62]. The distance was about eight miles from Moss Street [R. T. 36].

Shortly afterwards, appellant Lewis was observed as he operated the Ford station wagon on Ocean View [R. T. 53, 62-63]. He had just previously been seen in a black Buick which was driven away from the scene by appellant Lee [R. T. 45-47]. This was the same Buick that had been observed behind the Ford and Officer Gore's vehicle during the trip through Otay [R. T. 29, 62-63]. Its presence was reported to all units by radio [R. T. 62-63].

Lewis parked the Ford station wagon in front of a store or market and was arrested at that location [R. T. 64-65, 75]. Appellant Lee was stopped as she left the scene in the Buick. When the officers left their vehicle (which was not distinctively marked as a police vehicle), Lee drove away again: "She went around the corner real fast to the right and we spun our wheels to get around her, honked our horn and flashed the red light, and had to come up alongside and pull her over to the curb and make her stop." [R. T. 51, 148].

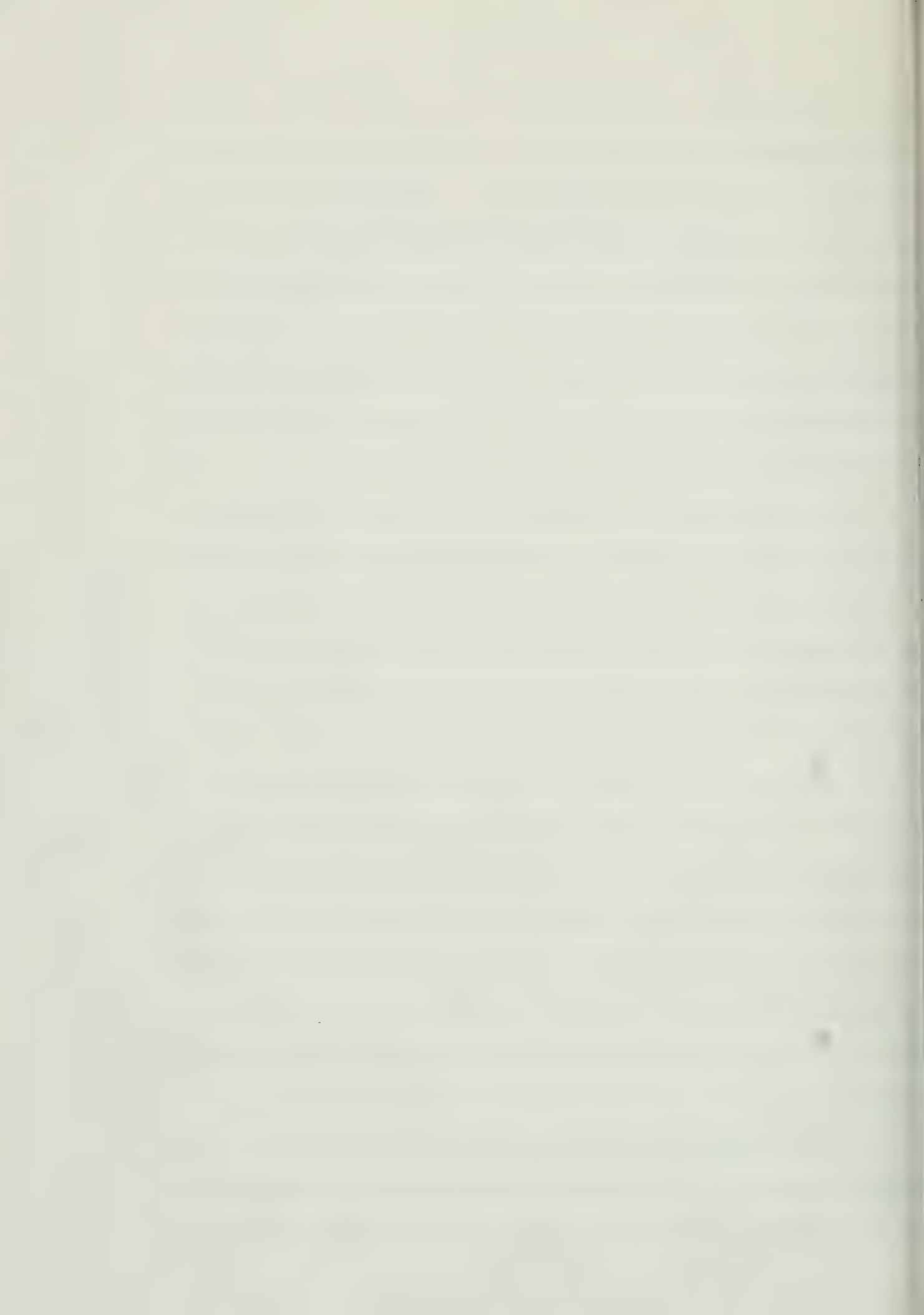


Agent Ellis, who participated in the arrest of Lee, questioned her regarding the whereabouts of the man who had been with her in the vehicle. She did not answer. Ellis told her that the man had been arrested, and she said, "I want to be with him" [R. T. 84-85]. Customs Investigator Prentice White asked Lee where she had gone or what she had done on that date. She said that they had come to San Diego. After White mentioned Tijuana she said that she had gone to Tijuana that morning [R. T. 142-43] and refused to make other statements [R. T. 142-43].

Since narcotics are frequently concealed in the undercarriage of a vehicle, and since a lift was needed in order to raise the Ford and examine the undercarriage, the Ford was moved to a service station about three blocks from the Customs office. The officers did not know the exact location of the contraband in the vehicle [R. T. 74, 151, 152].

The search of the Ford at the service station lasted from 1-1/2 to 2 hours before seven packets were found inside the moulding of the two front doors [R. T. 48, 65-66, 152]. Six of the packets contained cocaine and the seventh contained heroin. There were approximately six ounces of cocaine and at least three-fourths of an ounce of heroin [R. T. 18-21]. Various witnesses testified (either directly or by stipulation) concerning the "chain of possession" of the narcotics [R. T. 48-49, 66, 85-86, 110-113].

The cocaine had a sales value of about \$500 per ounce in Mexico (\$3,000). The six ounces had a potential wholesale value of \$30,000. The heroin had a potential wholesale value of about



\$3,000 per ounce [R. T. 99-101].

Appellant Lee testified that she and Lewis left Nevada at about midnight on Friday, October 8; that they "were just lovers taking a trip"; that they stopped in Los Angeles; that they went to Mexico at about 8:30 or 9:00 in the morning; that she and Lewis were together all of the time that they were in Tijuana; that she did not observe Lewis making any telephone calls or having a conversation with anyone else; and that Lewis later got out of the Buick in San Diego [R. T. 124-26, 130].

She continued as follows:

"Q. And where did he say he was going?

"A. He told me he was going to take a walk because he was mad and he told me to make two or three blocks and pick him up in about six minutes.

"Q. Where did he tell you to pick him up in about six minutes?

"A. Same place.

"Q. Same spot?

"A. Same area." [R. T. 130-31].

Lee denied under oath the assertion that she started to drive away after the officers stopped her and emerged from their vehicle [R. T. 141].

After questioning Lee, the officers listed her address as 2717 Royal Court, North Las Vegas, Nevada. She testified that her address at that time actually was 421 Elizabeth, North Las



Vegas, Nevada [R. T. 123, 145]. Lewis also lived at 421 Elizabeth in North Las Vegas. However, Lee testified that she did not live with Lewis [R. T. 129, 145]. The Buick involved in this case was registered to a "Katherine Joseph" at 421 Elizabeth Street, Las Vegas, Nevada [R. T. 146].

While questioning Lee, White was informed that she previously lived on Normandy Street in Los Angeles. Lee testified at the trial that she did not previously live on Normandy Street in Los Angeles and that she did not tell the officers that she had lived there [R. T. 129, 145-46].

Lee told White that she was employed as a dancer in an officers' club. She testified at the trial that she was a file clerk at the time of the arrest [R. T. 139, 143]. Lee told White that she was 20 years of age. She testified at the trial that she was 18, was born in March, 1947, and graduated from high school in 1963 [R. T. 128, 130, 135, 143].

Lee testified that Lewis had never told her anything about the case [R. T. 136]. She testified upon direct examination that she stopped in Los Angeles on the way to San Diego and did not know the time that she left Los Angeles [R. T. 124-25]. This testimony occurred after evidence had been introduced to the effect that Lewis had stated that he stopped in Los Angeles on the way [R. T. 89]. However, under cross-examination, Lee testified that they came straight from Las Vegas to Tijuana [R. T. 135]. Lee also testified that she was not advised of her right to an attorney by Agent Ellis. Ellis testified that he did advise her of her right to

an attorney [R. T. 90, 132].

Appellant Lewis did not testify [R. T. p. i].

It was necessary for the officers to employ a cross-cut Phillips screwdriver in order to remove the panels which concealed the narcotics [R. T. 48-49, 67]. Lewis had a Phillips screwdriver in his pocket on the date in question [R. T. 91].

October 9, 1965 was a Saturday [R. R. 124].

In the case of Lewis, the jury was instructed in regard to the statutory presumption under Title 21, United States Code, Section 174. This instruction was limited to Lewis and did not apply to appellant Lee [R. T. 204].

V

ARGUMENT

A. APPELLANT LEE HAD NO STANDING TO OBJECT TO THE ADMISSIBILITY OF THE CONTRABAND.

Appellant Lee contends that the trial Court committed prejudicial error in the denial of Lee's Motion to Suppress Evidence where the denial was based in part upon the ruling that Lee had no standing to object to the search. The search in question was the search of a Ford station wagon. Lee was not in the Ford when it was searched, was not in it when it was stopped, and did not at any time claim any interest in the Ford or in the contraband that was seized. Consequently, she had no standing to object to the

stopping of the Ford, the search of the Ford, and the admissibility of the narcotics in evidence. The jury was not instructed under the statutory presumption of Title 21, United States Code, Section 843 in Lee's case. This instruction was limited to appellant Lewis's case [R. T.204].

Diaz-Rosendo v. United States, 357 F.2d 124
(9th Cir. 1966).

Appellant Lee contends that the case of Jones v. United States, 362 U.S. 257 (1960), is controlling. In Diaz-Rosendo, supra, in an en banc hearing, this Court reached the unanimous conclusion that the Jones rule did not apply under circumstances similar to those of the instant appeal. ^{4/} Here, as in Diaz-Rosendo (at p. 132), appellant Lee was not on the premises "where the search occurred" and her conviction "did not flow from the possession" by herself at the time of the search.

B. THERE WAS SUFFICIENT EVIDENCE
TO SUSTAIN THE CONVICTION OF
APPELLANT LEE.

Appellant Lee argues that the evidence against her was

It should be noted that where a trial involves two defendants, the admissibility of evidence against one defendant will not be affected by the claim that the evidence was illegally seized from the co-defendant.

Mosco v. United States, 301 F.2d 180, 188
(9th Cir. 1962), cert. den. 371 U.S. 842
(1962);

Daddio v. United States, 125 F.2d 924
(2nd Cir. 1942).

insufficient to justify a verdict of guilty.

It is respectfully submitted that the circumstantial evidence was sufficient to sustain Lee's conviction. Aiding and abetting is frequently proved by circumstantial evidence.

Diaz-Rosendo, supra, at p. 129.

Appellants do not question the sufficiency of the evidence against Lewis, who picked up the vehicle with the narcotics and had the Phillips screwdriver in his pocket [R. T. 53, 62-63, 91]. Lee's participation in the crime was clearly shown by her assistance in driving the Buick away from the critical area of the criminal venture; her escape attempt; her seemingly inexhaustible capacity for falsehood when questioned concerning the matter; and the basic absurdities in her version of the events of the date in question.

It is evident that Lee's role in the crime was to operate the Buick. Lewis could not remove both vehicles from the vicinity of 45th and Ocean View, and he certainly would not want to carry out the difficult process of removing the narcotics from the Ford in a populated area. A driver was necessary, and Lee fulfilled that role. The question is whether she had knowledge of the crime. The evidence is circumstantial.

It is evident that Lee was with Lewis when the Ford was being followed by the same Buick in which Lee was later apprehended [R. T. 26-30, 51, 62-63]. The Ford, which upon later search was found to have the narcotics, entered the United States from Mexico at the port of entry at San Ysidro [R. T. 18-20, 22-23, 25, 65-66].

About one or one and a half miles from the part of entry, the Buick was observed behind the Ford. It continued to follow the Ford upon a winding route for a distance of from 5 to 5-1/2 miles, through Otay to a point in Chula Vista [R. T. 28-30, 36, 50]. The Ford was subsequently moved to a point about eight miles away from Chula Vista, in another city, San Diego. Appellants and the same Buick arrived at the scene, Lewis entered the Ford and the Ford and Buick left the scene [R. T. 36, 45-47, 53, 62-63].

Lee was stopped by the officers. After they left their vehicle, she attempted to escape in the Buick at high speed but was forced to a stop. She does not claim that she did not know that they were officers. On the contrary, she testified that she made no attempt to drive away after the officers first halted her forward progress [R. T. 141, 148].

When Lee was told that her male companion had been arrested, instead of indicating surprise or innocence, she merely stated, "I want to be with him" [R. T. 84-85]. When asked where she had gone or what she had done on that date, Lee said they had come to San Diego. She said nothing about Tijuana until it was evident that the officers were aware of the trip in that direction [R. T. 142-43].

The evidence is viewed in the light most favorable to the prevailing party in the trial Court.

Diaz-Rosendo, supra, at p. 129. Consequently, it is evident that Lee provided a false address, a false age, and a false occupation, either at the time of arrest or at the time of trial



[R. T. 123, 128, 130, 139, 143, 145]. At the time of arrest, Lee concealed the fact that she was living at the same address provided by the co-defendant, Lewis. At the trial, she admitted that she had lived at that address (421 Elizabeth Street, North Las Vegas, Nevada), but denied that she lived with Lewis [R. T. 123, 129, 145]. There was no attempt to explain the fact that the Buick was registered to a "Katherine Joseph" at the same address [R. T. 146].

Lee's explanation for the events in question was completely incredible. She testified that she and Lewis were together at all times in Tijuana and that she did not observe Lewis making any telephone calls or having a conversation with anyone else [R. T. 126]. She testified they separated in San Diego because Lewis "told me he was going to take a walk because he was mad and he told me to make two or three blocks and pick him up in about six minutes". She testified that he said he was to be picked up in the same "area" [R. T. 130-131].

Another remarkable feature in Lee's version of the events is her statement under oath, at the time of trial, to the effect that Lewis had never told her anything about the incidents in question [R. T. 136]. They had the same attorney.

In addition to the falsehoods already mentioned, Lee testified falsely that she did not tell the officers that she had previously lived on Normandy Street in Los Angeles [R. T. 129, 145-46]; testified falsely that she was not advised of her right to an attorney [R. T. 90, 132]; and testified on direct examination that she stopped in Los Angeles on the trip and contradicted this under cross-

examination [R. T. 124-25, 135]. It is doubtful that her numerous falsehoods can be attributed to lack of intelligence, for she testified under oath that she graduated from high school in 1963, which would have occurred at the early age of 16, since she testified that she was born in March 1947 [R. T. 130, 135].

False statements constitute evidence tending to show guilt.

Wilson v. United States, 162 U.S. 613, 621 (1896).

In the instant case, as in Eason v. United States, 281 F.2d 818, 821 (9th Cir. 1960), it is respectfully submitted that "the evidence of close friendship, joint venture and general conduct were sufficient to warrant a reasonable jury finding beyond reasonable doubt" that both appellants were guilty.

Appellant Lee cites Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962), cert. den. 371 U.S. 930 (1962). However, in Arellanes there was no evidence that the successful appellant, Mrs. Arellanes, did anything other than keep company with her husband and making one idle remark. This Court stated in the opinion:

"There was, we point out, no showing here of the elements of joint venture, as in Eason v. United States, 281 F.2d 818, 821 (9th Cir. 1960)."
(at p. 607).

The instant case has every indication of a joint venture, even to the extent that there was no separation in Tijuana, as there was in Eason, supra, where the defendants were together "most of the time" (at p. 820).

Appellant Lee emphasizes the requirement of proof of her knowledge of illegal importation, citing a number of cases involving the statutory presumptions under Title 21, of the United States Code. However, the possession presumption of Title 21, United States Code, Section 174, was not applied in Lee's case [R. T. 204] and is not relevant here. Possession is not an essential element of crimes arising under Title 21, United States Code, Section 174.

Rodella v. United States, 286 F.2d 306, 311

(9th Cir. 1960), cert. den. 365 U.S. 306

(1961);

Pon Wing Quong v. United States, 111 F.2d 751, 758

(9th Cir. 1940)

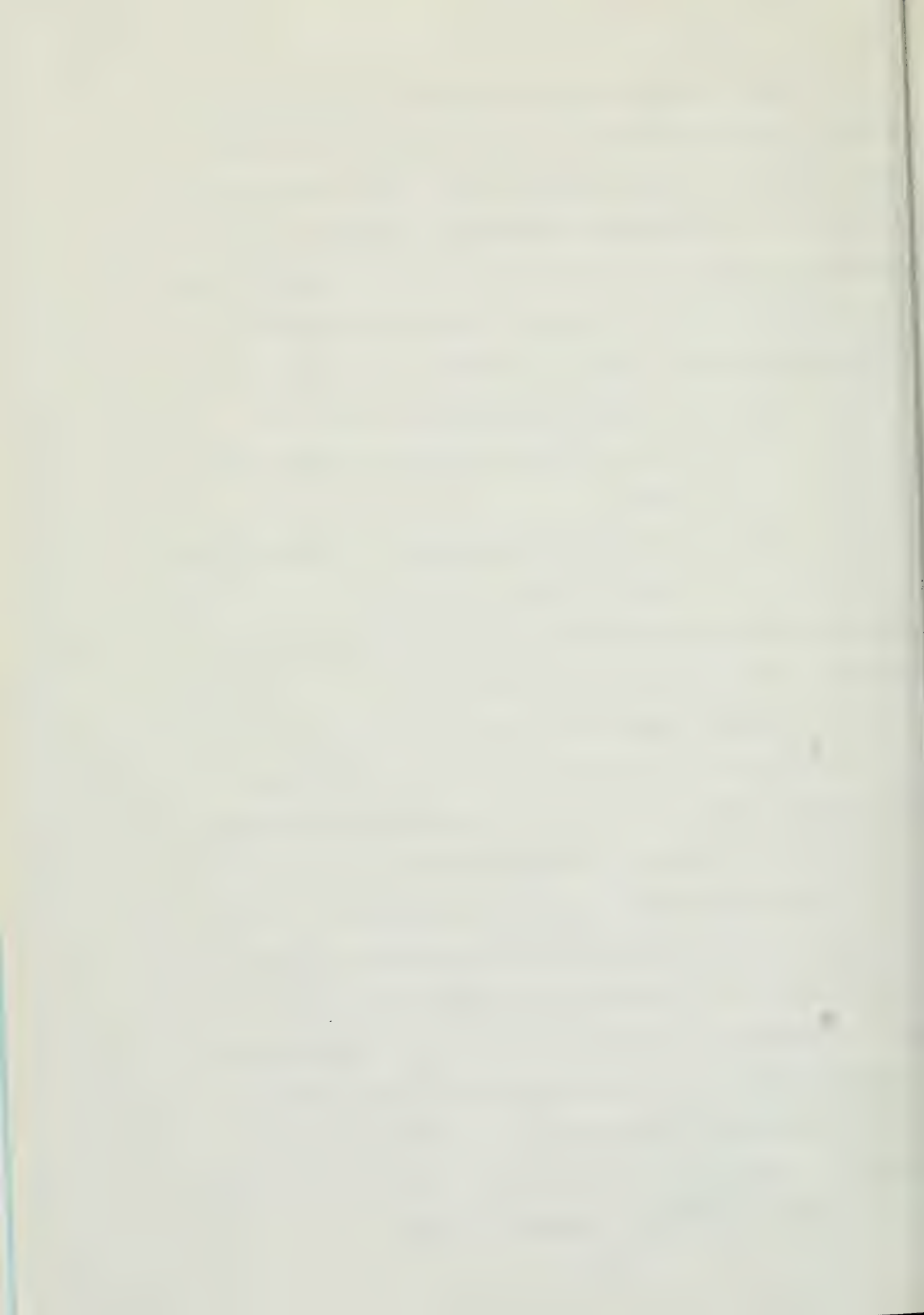
Consequently, the prosecution need not rely upon the statutory presumption arising from proof of possession.

Rodella, supra, at p. 311.

Proof of unlawful importation arises from the evidence of the entry by the Ford, the statement by a reliable informant to the effect that a narcotics dealer in Tijuana had offered to pay him \$50 for driving an automobile into the United States [R. T. 77, 93], the Lee-Lewis trip to Tijuana and their subsequent driving maneuvers in connection with the Ford, and other evidence in the case. While it is theoretically possible that the narcotics could have been secreted by Sandoval after he left the garage in Chula Vista, the issue is not resolved by speculation about remote possibilities.

In Stoppelli v. United States, 183 F.2d 391, 393-94 (9th Cir. 1950),

cert. den. 340 U.S. 864 (1950), this Court stated:



"No doubt, flights of fancy, to infer innocent possession, could be indulged in. Stoppelli might have had powdered sugar in the envelope to feed his pet canary. But in that event, how did it get into the package of heroin? A reasonable mind would have to discard its common sense to indulge in such capricious vagaries. It is such speculation and caprice that juries are instructed to avoid in resolving the question of reasonable doubt. "

This statement of the law would apply not only to speculation that the narcotics might not have crossed the border in the Ford, but also to "flights of fancy" involving speculation that Lee was not aware of Lewis' criminal design, under the evidence that was heard by the triers of fact.

C. APPELLANT LEWIS'S MOTION TO
SUPPRESS EVIDENCE WAS PROPERLY DENIED.

Appellant Lewis contends that the search of the Ford was not reasonable, because Agent Samaduroff "acted on the word of Agent Ellis" (Appellants' Opening Brief, p. 9). He does not contend that the search was unreasonable because it did not occur at the exact place and time of the arrest. ^{5/} It was entirely proper for

^{5/} Such a claim would not find support in the legal authorities. Not every search of a vehicle incident to arrest must take
(continued)

Agent Samaduroff to rely upon the instructions of Agent Ellis in making the arrest. In Cervantes v. United States, 263 F.2d 800, 804 (9th Cir. 1959), in which Officer Davis stopped the suspect's vehicle because he had received an "alert" and "not because of any personal knowledge of wrongdoing", this Court stated:

"Davis was unquestionably warranted in acting on the basis of the 'alert', since he was then entitled to assume that such alert was issued for probable cause." (Footnote 6, p. 804).

Samaduroff similarly could assume that Agent Ellis had probable cause.

In Williams v. United States, 308 F.2d 326 (C. A. D. C. 1962), the Court of Appeals rejected an argument practically identical to that set forth by appellant Lewis:

"We have set forth appellant's contentions in some detail because they are relatively novel claims. We

5/ (continued) place at the scene of arrest.

United States v. Wallack, 255 F. Supp. 566, 568-69 (S. D. N. Y. 1966).

Furthermore, where there is a right to impound a vehicle, it is in the lawful custody of the United States and may be searched away from the scene of an arrest.

Drummond v. United States, 350 F.2d 983, 988 (8th Cir. 1965).

In addition, the relation of the search to the scene of arrest would be immaterial if this was a border search or if there was reasonable cause to believe that the vehicle contained contraband.

avail ourselves of the occasion to make it clear that in a large metropolitan police establishment the collective knowledge of the organization as a whole can be imputed to an individual officer when he is requested or authorized by superiors or associates to make an arrest. The whole complex of swift modern communication in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his first hand knowledge of facts concerning a crime or alleged crime."

Williams, supra, at p. 327.

Appellant Lewis states that Agent Ellis was not a reliable party. However, it has been held that an officer is a reliable informant.

People v. Lopez, 196 Cal. App.2d 651, 654 (1961).

In Cervantes, supra, the search was unreasonable because the officer who was responsible for the "alert" did not have probable cause. In the instant case, however, Agent Ellis, who ordered Agent Samaduroff to "pick up" the Ford and occupant [M. S. 27-28], had probable cause to arrest. Agent Ellis had been informed by a previously-reliable (three times) informant that a Ford with a certain license number would be used to transport a quantity of narcotics into the United States. The Ford entered the United States on the predicted morning [M. S. 18-19, 31]. Ellis needed

nothing more, since an arrest may be based solely upon information provided by a single reliable informant.

Costello v. United States, 324 F.2d 260, 262

(9th Cir. 1963), cert. den. 376 U.S. 930
(1964);

Jones v. United States, 326 F.2d 124, 128-129

(9th Cir. 1963), cert. den. 377 U.S. 956
(1964);

United States v. Salgado, 347 F.2d 216, 217

(2nd Cir. 1965), cert. den. 382 U.S. 870
(1965);

United States v. Campos, 255 F. Supp. 853, 857

(S.D. N.Y. 1966);

People v. Guerrera, 149 Cal. App.2d 133, 136 (1957);

People v. Garnett, 148 Cal. App.2d 280, 284 (1957).

Although corroboration of this previously-reliable informant's information was not required, corroboration was provided by the fact that the Buick followed the Ford for a distance of from 5 to 5-1/2 miles on a winding route through Otay to Chula Vista [R. T. 28-30, 36, 50], and the additional fact that a man from the same Buick entered the Ford an additional eight miles away, in another city, and started to drive away [R. T. 36, 45-47, 53, 62-63]. ^{6/}

^{6/} Some of these facts appear only in the transcript of evidence at trial, as distinguished from the transcript of testimony at the hearing of the Motion to Suppress Evidence. However, the evidence may be considered upon appeal. (continued)

Agent Ellis presumably was aware of the fact that a man from the Buick had entered the Ford and was driving away, as Samaduroff had just reported his observation of the Buick to all units by radio, he had another radio conversation with Ellis when he saw the Buick in a parked position, he had an additional radio conversation with Ellis, and he was acting under the directions of Ellis when he arrested the driver of the Ford [R. T. 62-65]. Samaduroff had previously been informed (1) that Ellis had good information (or words to that effect) that there were narcotics in the Ford, (2) that the Buick had been following some distance behind the Ford, and (3) that a man from the same Buick had entered the Ford and was driving that vehicle [M. S. 6-9, 13]. Consequently, Samaduroff had all of the essential particulars known to the officer (Ellis) who ordered the arrest, which is a factor emphasized by the Court in Ng Pui Yu v. United States, 352 F.2d 626, 629 (9th Cir. 1965).

It should be mentioned that the officers did not need probable cause to arrest Lewis, so long as they had probable cause to believe that the vehicle contained smuggled merchandise.

Browning v. United States, 366 F.2d 420, 422

(9th Cir. 1966);

Thomas v. United States, 363 F.2d 159, 160

(9th Cir. 1966).

Validity of an arrest is immaterial where the search is based upon reasonable grounds to believe that contraband is present.

6/ (Continued)

Carroll v. United States, 267 U.S. 132, 162 (1925).

Hernandez v. United States, 353 F.2d 624, 627

(9th Cir. 1965).

Furthermore, there is good authority for the conclusion that the search was valid as a border search, requiring neither an arrest nor probable cause.

King v. United States, 348 F.2d 814, 817

(9th Cir. 1965), cert. den. 382 U.S. 926

(1965);

Alexander v. United States, 362 F.2d 379, 381-82

(9th Cir. 1966).

In Alexander, this Court held (at p. 382) that the legality of a border search that is not made in the immediate vicinity of the border "must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search'." ^{7/} It is respectfully submitted that the Alexander test was met in the instant case.

^{7/} In his thorough discussion of the subject of border searches in the dissenting opinion in Corngold v. United States, 367 F.2d 1 (9th Cir. 1966), Judge Barnes states (footnote at p. 16) that the rule is more liberal than Alexander suggests.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted
that the judgments of the District Court should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this
brief, I have examined Rules 18 and 19 of the United States Court
of Appeals for the Ninth Circuit, and that, in my opinion, the
foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
PHILLIP W. JOHNSON

NO. 21,049 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ISAO YAMADA, MITSU YAMADA,
KATSUMI YAMADA and THREE STAR
PRODUCTS, LTD.,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

RESPONDENT'S BRIEF

CECIL F. POOLE
United States Attorney

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102

Attorneys for Respondent

FILED

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v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

RESPONDENT'S BRIEF

JURISDICTION

Petitioners invoke the jurisdiction of
this Court pursuant to 8 USC 1105(a).

The Order to Show Cause issued on June 11,
1963, and charged deportability under Section 241
(a)(2) of the Act (8 USC 1251(a)(2)), remained
longer than permitted after nonimmigrant admission

under Section 241(a)(15) (8 USC 1101(a)(15)), (R., Exhibit No. 1, p. 137). After the hearing on July 29, 1963, the Special Inquiry Officer made his decision on September 3, 1964 (R., p.25) and found that "the deportation charge against each of the respondents has been sustained." He then accorded them the privilege of voluntary departure in lieu of an order of deportation.

Petitioners appealed to the Board of Immigration Appeals on September 21, 1964. The Board of Immigration Appeals dismissed the appeal on January 15, 1965. (R., p. 1.)

On March 26, 1965, Three Star Products, Ltd., filed Form I-140, petition (Section 203(a)(1)(A)) to classify status of alien as first preference quota immigrant (R., pp 265-270). ^{1/}

On June 25, 1965, the petition of Three Star Products was denied by the District Director. (R., p. 257.)

1/ The Certified Record is divided into two parts. The Record pertaining to the Three Star Products, Ltd., application begins at page 226.

On July 1, 1965 a motion was made for reconsideration (R., p. 256.) This motion was granted on July 12, 1965, and Three Star was accorded to August 9, 1965, to submit any additional evidence or arguments. The time was extended from August 27, 1965 (R., p. 253), to October 15, 1965 (R., p. 250), and on November 15, 1965, respondent was notified by the Department of Labor, State of Hawaii, that "we have declined to initiate a clearance order in this case" (R., p. 247.) On November 30, 1965, a notice of denial was sent to Three Star Products Ltd. (R., p. 245) by the respondent. On December 13, 1965, Three Star Products Ltd. appealed to the Regional Commissioner (R., p. 234). The appeal was dismissed by order of the Regional Commissioner on March 21, 1966 (R., p. 228).

The petition to review the final order of deportation was filed by petitioners on June 3, 1966, a few days short of a year and six months from the date of the dismissal of the appeal by

the Board of Immigration Appeals (January 15, 1965), but three months and a day following the dismissal of the appeal of Three Star Products, Ltd., from the denial of their petition.

The petition herein is filed in the names of the three subject aliens and the Three Star Products, Ltd. By joining Three Star Products, Ltd., review of the petition for first preference visa is sought.

Petitioners in their jurisdictional statement have cited 8 USC 1105(a) without further amplification, other than to say that there is no final order of deportation more than six months prior to the filing of this petition. Clearly the final order was a year and a half prior to the filing of the petition. The application of Three Star Products to classify the beneficiary as a first preference alien under Section 203(a)(1)(A) of the Act did not affect the validity of the deportation order. Three Star could not on its own petition this Court to review the denial

of the application. The situation is thus one wherein the subject aliens failed to petition for review within the six months following the dismissal of their appeal, but rely upon a petition filed by Three Star Products as having extended the time to appeal to six months subsequent to denial of the petition.

Does this Court have jurisdiction?

Reference is first made to Foti v. Immigration & Naturalization Service, 375 US 217, and to Giova v. Rosenberg, 379 US 18, which, we believe, favor a broad interpretation of Section 106(a) to include such matters as applications for discretionary relief.^{2/} This broad interpretation encompasses other determinations made during and incident to the administrative proceedings conducted by the Special Inquiry Officer which results in the final order of deportation.

2/ Samala v. INS, 336 F.2d 7 (5th Cir.); Talavera v. Pederson, 334 F.2d 52 (6th Cir.); Skiftos v. INS, 332 F.2d 203 (7th Cir.); Scalzo v. Hurney, 338 F.2d 339 (3d Cir.); Mendez v. Major, 340 F.2d 128 (8th Cir.); Roumeliotis v. INS, 304 F.2d 453 (cert. den. 371 US 921).

In the Yamada case, the petition for first preference visa was directed to the District Director by the Three Star Products, Ltd. Upon the denial, the appeal was to the Regional Commissioner. If the only question presented for decision involves the scope of judicial review by the Courts of Appeal of administrative determination made during the course of deportation proceedings (Foti v. INS, supra, p. 221), then it would appear that this Court does not have jurisdiction unless some other criterion is found. The Supreme Court in Foti v. INS, supra, p. 225, quoted from the Committee Report on §106(a) concerning the Congressional purpose "to create a single separate statutory form of judicial review of administrative orders for the deportation * * * of aliens * * *".

This Court, in Bregman v. INS, 351 F.2d 401, considered the effect of the denial of a motion to reopen, made within six months of the final order,

and the petition to the court within six months of the denial of the motion.

This Court held "It follows from Giova that if the motion to reopen before the Board is within six months of the final order of deportation and the petition to this Court is within six months of the denial of the motion * * *, this Court has jurisdiction to review both the final order of deportation and the denial of the motion to reopen." The motion to reopen clearly required a "determination to be made during and incident to the administrative proceedings conducted by the Special Inquiry Officer."

Not so Yamada.

STATEMENT OF FACTS

Assuming this Court has jurisdiction, there are two separate proceedings to be considered.

First: The determination of deportability on the charge in the order to show cause and Section 241(a)(2) of the Act (8 USC 1251(a)(2)). Included is the denial of the application for extension of

stay and denial of the motion for reconsideration, said denials having been based upon the District Director's finding that Isao Yamada was never entitled to the status of an employee of a treaty investor granted him on December 8, 1958.

Second: The denial of the application of Three Star Products for a first preference visa, of which Isao Yamada was the beneficiary.

First, on the order of deportation, Isao Yamada was admitted to the United States at Honolulu, Hawaii, on June 8, 1957, as an industrial trainee under Section 101(a)(15)(H)(iii) of the Act. On December 8, 1958, he filed an application for change of nonimmigrant status to that of a nonimmigrant employee of a treaty investor under Section 101(a)(15)(E)(ii) of the Act. This application, approved by the District Director on December 8, 1958, authorized stay in that status to December 8, 1959, conditioned upon maintenance of status. The other two

petitioners were admitted to the United States on June 25, 1960, as the family of a treaty investor employee. All petitioners were given extension of temporary stay to December 19, 1962. On January 16, 1963 the District Director denied their application for further extension (R., pp. 159-162) on the ground that Isao Yamada was never entitled to the status of an employee of a treaty investor. On May 2, 1963 their motion for reconsideration was denied for the same reason (R., p. 171). The order to show cause issued on July 29, 1963, charging all three petitioners to be deportable under Section 241 (a)(2) of the Act. A hearing was conducted by a Special Inquiry Officer on February 17, 1964, and in a decision dated September 31, 1964, the Special Inquiry Officer found the charge sustained, and granted petitioners the privilege of voluntary departure in lieu of deportation. This decision was appealed to the Board of Immigration Appeals. By decision dated January 15, 1965, the Board of Immigration Appeals dismissed the appeal.

Second, on the application for first preference visa, on March 26, 1965, Three Star Products filed a petition to classify the beneficiary Isao Yamada as a first preference alien under Section 203(a)(1)(A) of the Act (8 USC §1153(a)(1)(A)). On April 16, 1965, the petition was returned to the petitioner for compliance with the following: (1) submit a United States Employment Service clearance order (R., p. 229). On May 27, 1965, application was made to the Employment Service Division, Department of Labor and Industrial Relations, State of Hawaii (R., p. 261). By letter dated June 1, 1965, the Department of Labor informed the applicant that because of certain specifications the matter was considered as not warranting a certified clearance order. (R, p. 260).

On June 6, 1965, a waiver of clearance order was sought (R., p. 259). On June 28, 1965 the District Director denied the application for waiver of the clearance order and the petition to classify Isao Yamada as first preference quota

immigrant (R., pp 257-258). On July 1, 1965, a motion was made for reconsideration (R., p. 256). Time was allowed to present additional evidence (R., p. 253). On October 22, 1965, the warrants of deportation were cancelled pending final adjudication on the visa petition (R., p. 249). By letter dated November 15, 1965, the Department of Labor notified the District Director that it was their opinion that "the position can be filled by local manpower within a relatively short training period. For this reason, we have declined to initiate a clearance order in this case." (R., p. 247). On November 30, 1965 the District Director notified applicant Three Star Products that upon reconsideration, the petition was denied (R., p. 245). The Order of the District Director denying the petition was appealed to the Regional Commissioner.

This appeal was dismissed by order of the Commissioner on March 21, 1966 (R., pp 228-233) on the ground that, absent the clearance order, the petition was not approvable under the statute or

regulations in existence prior to December 1, 1965, nor under Public Law 89-236, October 3, 1965, and the regulations promulgated thereunder without a "'certification' from the United States Employment Service" (R., p. 233).

The petition to review was filed in this Court on June 3, 1966.

SPECIFICATION OF ERRORS

1. Respondent erred in holding that a non-immigrant employee of a treaty investor under the Treaty of Friendship, Commerce and Navigation between the United States and Japan must continue to secure extension of stay in the United States;

2. Respondent erred in holding that permanent resident aliens do not come within the meaning of "nationals" holding 51% interest to qualify petitioner as a treaty investor;

3. Respondent erred in holding that Three Star Products, Ltd., cannot occupy status of a treaty investor;

4. Respondent erred in refusing to accord Isao Yamada status of an employee of a treaty investor;

5. Respondent erred in requiring clearance order for consideration of petition for classification as first preference quota immigrant.

QUESTIONS PRESENTED

1. Does Isao Yamada have any status under the Treaty which permits him to remain in the United States?

2. Is the submission of a labor clearance order required for consideration of the petition to classify as first preference quota immigrant?

The Board of Immigration Appeals considered the appeal before it as presenting four questions:

1. Jurisdiction of the Special Inquiry Officer and the Board to review the action of the District Director.

This point was briefed at length by the acting trial attorney (R., pp 42-48). He urged the position that where an application for an extension of stay is denied "as a matter of law" by a District Director, as distinguished from a matter of discretion,

the validity of the legal determination of the District Director may be reviewed in deportation proceedings by the Special Inquiry Officer, and thereafter by the Board of Immigration Appeals. The Service's representative before the Board of Immigration Appeals stated to the Board that the trial attorney erred in urging his position, and that the Special Inquiry Officer erred in so holding.

The Board of Immigration Appeals held as follows (R., P. 3):

"We have carefully considered the issue of jurisdiction engendered by this case. The determination of the respondents' deportation as having remained longer originated with the action of the District Director. His denials were based on a legal determination arising from his construction of the meaning of treaty investor employee (as defined in the Immigration and Nationality Act). A consideration of the respondents' deportability is inescapably merged with the District Director's finding as to the respondents' employee. The intent of 8 CFR 3.1(d) necessitates our assuming jurisdiction in order to determine deportability of the respondents. We so hold."

2. Does the treaty between the United States and Japan supersede the provision of the Immigration and Nationality Act of 1952 and the regulation promulgated thereunder?
3. Are respondents properly entitled to status (in the case of the adult male as a treaty investor employee?)
4. Is the charge in the order properly sustainable as to the female and minor respondents?

Petitioners raise no issue on this question before this Court, neither do respondents.

Respondents submit there are but two questions:

1. The status of Isao Yamada;
2. The requirement of the clearance order on the First Preference Application.

The first question goes to the final findings of the Special Inquiry Officer and the Board of Immigration Appeals.

The second question goes to the final rulings of the District Director and the Regional Commissioner.

ARGUMENT

I

THE PETITIONER ISAO YAMADA IS
NOT ENTITLED TO STATUS AS A
TREATY INVESTOR EMPLOYEE

Isao Yamada was admitted to the United States as a nonimmigrant industrial trainee. (Section 101(a)(15)(H)(iii)). He later applied for change of nonimmigrant status to that of a nonimmigrant employee of a treaty investor under Section 101(a)(15)(E)(ii). This application was at first approved, authorizing a stay in that status to December 8, 1959. The application for extension was denied on the ground that his employer, Three Star Products, Ltd., did not qualify as a treaty investor.

The Board of Immigration Appeals

(R., p. 5) said:

"We do not think it necessary to delve further into the operation and history of the respondent's employee. We consider academic the tenor and intent of the treaty under which respondent seeks to justify his claim. There is nothing unusual in the language of the document. Mutuality is stressed but the treaty does not in any manner constitute carte blanche to the nationals of one country to enter and work in the host country with no conditions other than employers be nationals of the other country."

Isao Yamada entered the United States under Section 101(a)(15)(H)(iii) which provides:

(H) "An alien having a residence in a foreign country which he has no intention of abandoning * * * (iii) who is coming temporarily to the United States as an industrial trainee;"

On December 11, 1958, upon application, his status was changed to that of treaty investor under Section 101(a)(15)(E)(ii). This application was granted on the representation that Three Star Products, Ltd., was qualified as a treaty investor. The application for extension submitted on December 7, 1962, was denied on the basis that Three

Star Products, Ltd., does not qualify as a treaty investor (R., p. 161).

Title 22 CFR 41.41 states in part that an alien shall be classified as a nonimmigrant treaty investor if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of Section 101(a)(15)(E)(ii) of the Act; that: (3) he is employed by a treaty investor in a responsible capacity and the employer is a foreign person or organization of the same nationality as the applicant. Title 22 CFR 41.41 further states "and he intends to depart from the United States upon termination of his status, and (2) he is an alien who has invested or is investing capital in a bona fide enterprise and is not seeking to proceed to the United States in connection with a marginal enterprise solely for the purpose of earning a living."

Petitioners' first argument is that under the treaty "extensions of stay is not necessary." The District Director having "granted the nonimmigrant status of a responsible employee of a treaty investor

(E2 status) under the said treaty, their status having been determined, they are thereafter privileged to remain in the United States so long as they maintain their status under the Treaty."

The E2 status was erroneously allowed under the statute and the treaty. Petitioners originally were admitted pursuant to the Immigration Act (Section 101(a)(15)(H)(iii) and the applicable regulations. Application was then made for change of status to nonimmigrant 101(a)(15)(E)(ii). There is no provision in the treaty for any change of status, nor for the manner in which an application for change could be made. The application could be acted upon only under the statute and the regulations.

Reference is here made to the Pre-Decision Brief of the Acting Trial Attorney (R., pp 42-62), and to the Service representative's Memorandum of Law (R., pp 9-20), which fully presented this issue of the case to the Special Inquiry Officer and the Board of Immigration Appeals.

The Board of Immigration Appeals

(R., p. 4) stated the following:

"Our study of the treaty between the United States and Japan leads us to the conclusion that the agreement was a self-executing document."

It is difficult to consider this document as "self-executing" to the exclusion of implementation by statute and regulations. Necessarily, the treaty requires the Immigration and Nationality Act and the regulations to provide the framework within which the Treaty could be effected.

The Board went on to say (R., p. 4):

"However, in one of the landmark cases in the United States it was held that a self-executing treaty supercedes an earlier act of Congress only insofar as it is inconsistent therewith. Cook v. United States, 288 US 102). Also in the case of John T. Bill Co. v. United States, 104 F.2d 67 [Custom and Patent Appeals], the Court stated: 'It is equally well established that repeals by implication are not favored and that in the case of treaties, as in the case of statutes, where provisions "cover, in whole or in part, the same matter, and are not irreconcilable, the duty of the court - no purpose to repeal being clearly expressed or indicated - is, if possible, to give effect to both"'. 2

"These two cases together with innumerable others stress the point that prior acts of Congress are not to be superceded by treaties unless the history of the treaty and the very language of such treaty together with any intentions specified have indicated abrogation of prior federal legislation. The treaty involved herein expresses no such intent nor is there anything in its history, preamble, articles or protocol showing any basis for a conclusion that the I&N Act of 1952 was to be superceded. As a matter of fact Article I(c) in referring to the entry of treaty traders and treaty investors into the United States states 'subject to laws relating to the entry and sojourn of aliens' and therefore is specifically indicative of such lack of intent."

The Board concluded (R., p. 5):

"Accordingly, we believe that the I&N Act of 1952 together with the implementing regulations must decide the issue as to whether or not the respondents are deportable as charged."

The employer of petitioner Isao Yamada is the Three Star Products, Ltd., a corporation organized in Hawaii, presently having a majority of its stock owned by Japanese nationals who are permanent residents of the United States. All of its manufacturing and selling is done in Hawaii. The corporation has

never claimed to be within the Treaty as a treaty investor, in fact such status was specifically disclaimed. (R., pp 201-210.)

The Board of Immigration Appeals held the charge also sustainable as against the wife and minor petitioner. These two petitioners were admitted as nonimmigrants, authorized to stay in the United States for a specific period of time. Their applications for extension were denied, and they have remained thereafter without authority.

II

A Labor Clearance is necessary
to accord full consideration to
the petition for classification
as First Preference Immigrant.

As previously stated, the petition for classification as First Preference Immigrant was filed by Three Star Products, Ltd., in behalf of Isao Yamada. The District Director's denial was based on petitioner's failure to

present a United States Employment Service Clearance Order. (R., p. 258, p. 246).

Petitioner's argument here was also presented to the Regional Commissioner on appeal, and was given thorough consideration. (R., pp 228-233.) The Regional Commissioner's Opinion and Order is attached hereto as Annex I, and is embraced without further discussion as completely responsive to petitioner's contentions.

The Regional Commissioner (R., p. 232) has called attention to the requirement of Section 212(a)(14) (8 USC 1182(a)(14) of the Act, as amended by P.L. 89-236, Section 10.

P.L. 89-236, page 7:

"Sec. 10. Section 212(a) of the Immigration and Nationality Act (66 Stat. 182; 8 USC 1182) is amended as follows:

(a) Paragraph (14) is amended as follows:

'Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing,

"qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8);"

Page 3, PL 89-236:

"Sec. 203(a)(8) * * * *

No immigrant visa shall be issued to a nonpreference immigrant under this paragraph, or to an immigrant with a preference under paragraph (3) or (6) of this subsection, until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(14)."

Absent a savings clause in the statute,
the decision of the District Director would be
subject to the statute as amended.

Fassilis v. Esperdy, 2 Cir.
301 F.2d 429

Patsis v. I&NS, 8 Cir.
337 F.2d 733
cert. den. 380 US 952

Ziffrin v. U. S.,
318 US 73

CONCLUSION

It is respectfully submitted:

1. Petitioners Yamada failed to file
their petition for review in this Court within
six months of the dismissal of the appeal by
the Board of Immigration Appeals.

2. The Special Inquiry Officer and the
Board of Immigration Appeals had jurisdiction
to review the denial by the District Director of

Section 101(a)(15)(E)(ii) status to petitioners,
and of further extensions of stay.

3. The Board of Immigration Appeals
properly affirmed the decision of the Special
Inquiry Officer, and dismissed the appeal.

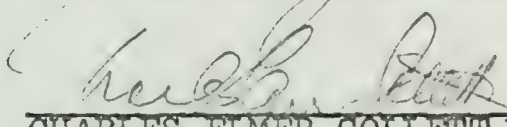
4. The outstanding order of deportation
of petitioners is valid, and the decision of
the Board of Immigration Appeals should be
affirmed.

5. The District Director properly denied
the application of Three Star Products, Ltd.,
in behalf of Isao Yamada for first preference
classification.

Respectfully submitted:

CECIL F. POOLE
United States Attorney

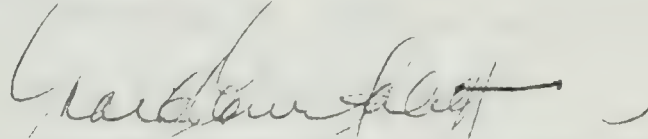
By:



CHARLES ELMER COLLETT
Chief Assistant United States Attorney
Attorneys for Respondent

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

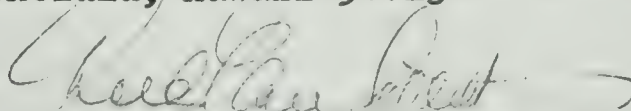
} NO. 21,049

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the Northern District of California, and is a person of such age and discretion as to be competent to serve papers.

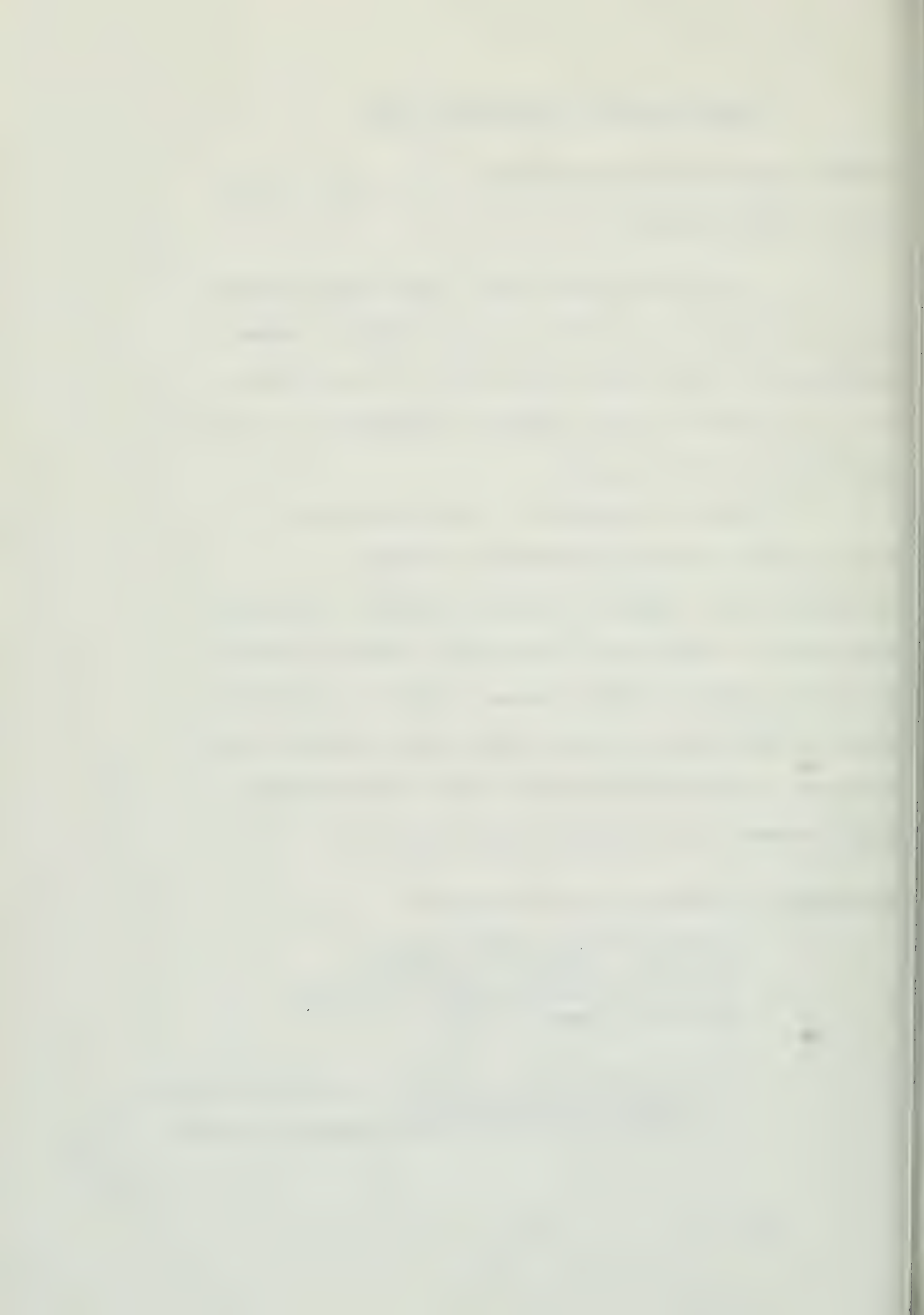
That on December 2, 1966 he served a copy of the attached RESPONDENT'S BRIEF by placing said copy in a penalty airmail envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at 450 Golden Gate Avenue, San Francisco, California.

ADDRESSEE: Attorney for Petitioner:

ROBERT WON BAE CHANG, Esq.
Hoddick, Rothwell and Chang
318 First National Bank Building
Honolulu, Hawaii 96813



CHARLES ELMER COLLETT
Chief Assistant United States Attorney



SOUTHWEST REGIONAL OFFICE
TERMINAL ISLAND
SAN PEDRO, CALIFORNIA 90731

AND REFER TO THIS FILE NO.

March 2, 1966

FILE NO: All 769 844 - Honolulu

RE: Three Star Products, Ltd., petitioner in behalf of Isao Yamada

PETITION FOR CLASSIFICATION OF BENEFICIARY UNDER SECTION 203(a)(6) OF
THE IMMIGRATION AND NATIONALITY ACT FORMERLY SECTION 203(a)(1)

BEHALF OF PETITIONER: Robert Won Bae Chang
Attorney at Law
318 First National Bank Building
Honolulu, Hawaii

DISCUSSION: This is an appeal from the District Director's order denying
the petition on the ground that the petitioner has not established an
urgent need for the services of the beneficiary.

Petitioner is a business organization engaged in food processing, manu-
facturing and distributing primarily in perishable vegetables. The firm,
established in 1943, employs an average of ten workers and has gross
annual sales of from \$140,000 to \$150,000. Petitioner seeks the benefi-
ciary's services as manager of operations and vice president.

Beneficiary, a 42-year-old married male, native and citizen of Japan,
entered the United States on June 8, 1957 as an industrial trainee.
Beneficiary's wife and son, both citizens of Japan, entered the United
States on July 15, 1960 as nonimmigrants. On January 15, 1965 the Board
of Immigration Appeals dismissed the family's appeal from the Special
Inquiry Officer's order finding them in the United States in violation
of the terms of their admission and granting voluntary departure with an
intermediate order of deportation. Pending the outcome of the instant appeal
the family's departure from the United States has not been required.

The District Director's order of denial is based on the petitioner's
failure to present a United States Employment Service clearance order for
the position petitioner seeks to fill. Since counsel in his brief presents
several points for consideration, it would be well at this point to present
the following brief chronology of events in this case:

March 26, 1965 - Petition filed to classify the beneficiary as a
first preference alien under Section 203(a)(1)(A) of the Immigra-
tion and Nationality Act.



April 16, 1965 - Petition returned to petitioner for compliance of the following: (1) Submit a United States Employment Service clearance order, as explained in item 4 of the instructions (on the petition); (2) Complete item 40 of page 4 (on the petition); (3) Follow items 5 and 7 of the instructions (on petition) concerning documentary evidence to establish eligibility (of beneficiary).

May 27, 1965 - Counsel applied to Employment Service, Honolulu, Hawaii for a clearance order and returned the petition to the Service without the requested evidence of beneficiary's qualifications.

June 1, 1965 - Employment Service informed counsel that due to the nature of the request involved that agency could take no further action in the case.

June 6, 1965 - Counsel requested a waiver of the clearance order based on the response received from the Employment Service.

June 25, 1965 - District Director denied the petition on the ground that since the required clearance order had not been submitted, an urgent need for the beneficiary's services had not been established. Counsel's request for waiver of the clearance order was denied.

July 1, 1965 - Counsel submitted motion to reconsider the denial on the basis that further inquiry would be made to the Employment Service in an effort to obtain a clearance order.

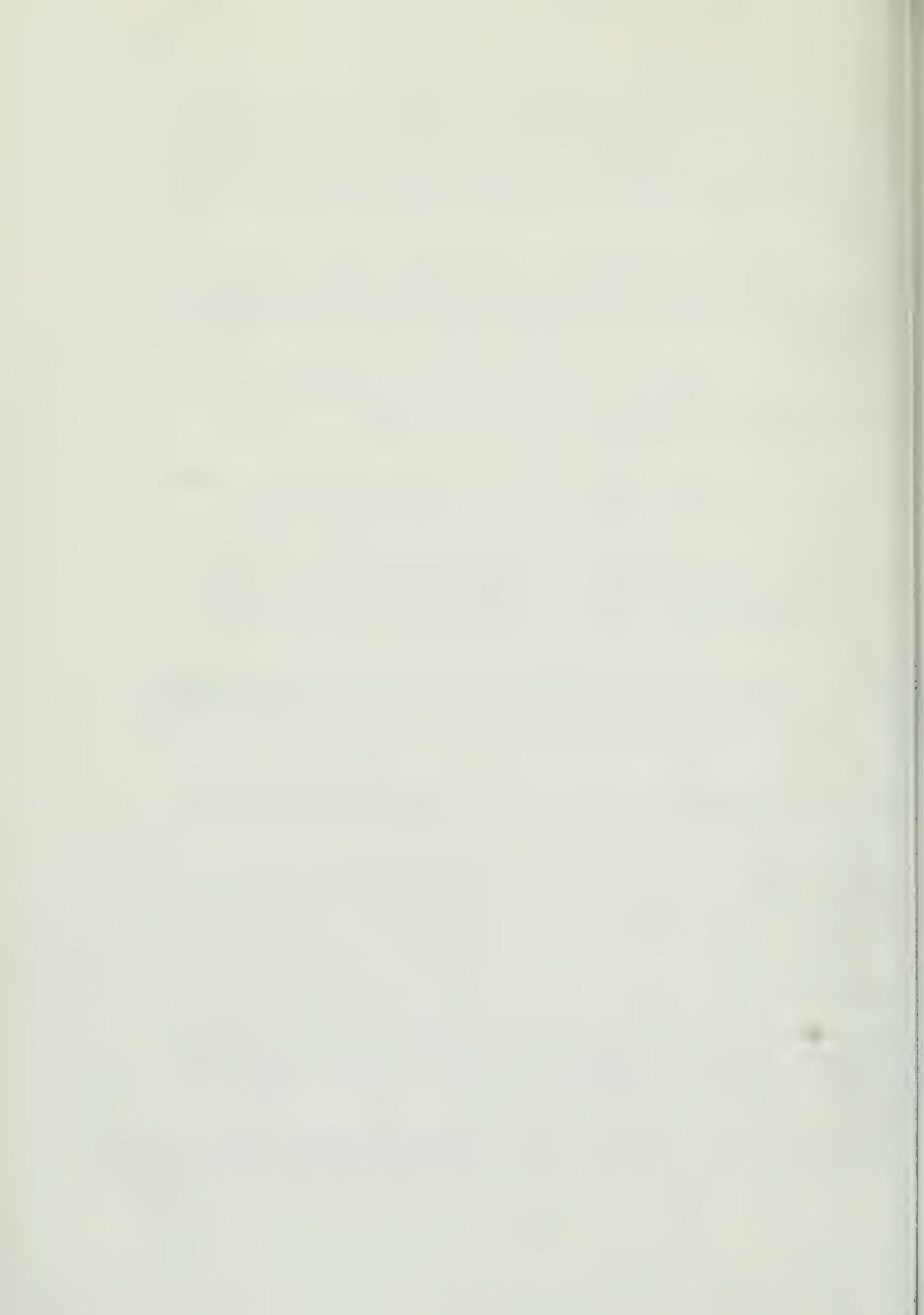
July 14, 1965 - District Director granted counsel's motion to reopen and reconsider the petition and granted until August 9, 1965 for submission of additional evidence or argument.

August 6, 1965 - District Director granted counsel's request of July 31, 1965 for additional time within which to submit evidence and the date was extended to the requested August 27, 1965.

August 26, 1965 - Employment Service advised counsel that there would be a delay in acting on his request for a clearance order.

September 3, 1965 - District Director granted counsel's request of August 26, 1965 for additional time within which to submit evidence and date was extended to October 15, 1965 within which to submit the required clearance order.

October 25, 1965 - Counsel advised that the Employment Service letter of June 1, 1965, supra, was considered by the petitioner



as authority for the Service to waive the clearance order. Counsel, in effect, requested that the petition be adjudicated on the record.

November 15, 1965 - Employment Service informed the Service that in their opinion petitioner's position of operations manager can be filled by local manpower within a relatively short training period and for this reason declined to initiate a clearance in the case.

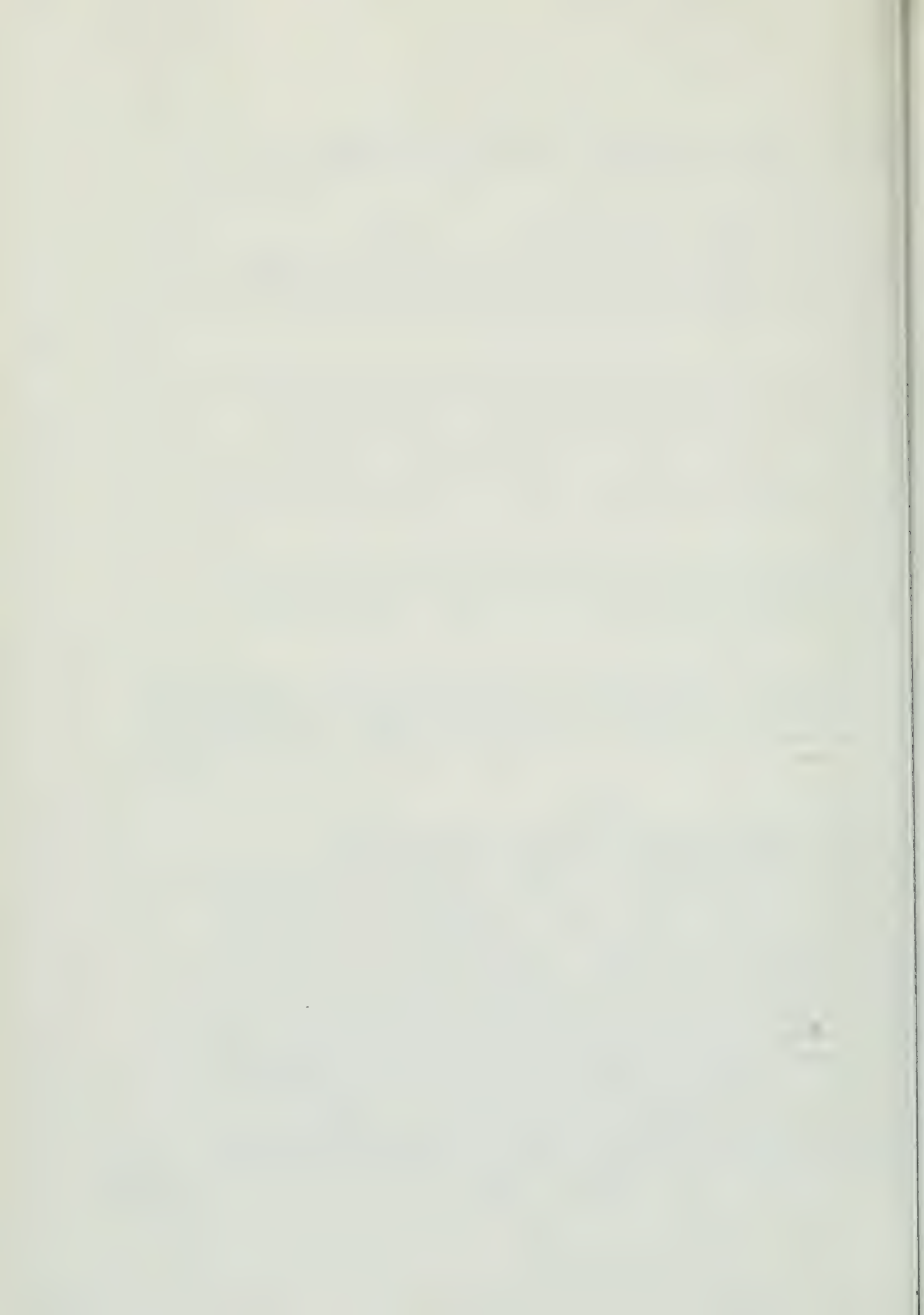
November 30, 1965 - District Director denied the petition on the ground that the petitioner failed to establish urgent need for the services of the beneficiary. The District Director's denial was based on the petitioner's failure to present a clearance order and the Employment Service's statement that the position can be filled by local manpower within a relatively short training period.

December 13, 1965 - Counsel submitted the instant appeal and on December 21, 1965 the District Director granted counsel until January 20, 1966 to submit his brief. The brief was submitted January 19, 1966.

It will be noted that the petition was filed, considered and denied under section 203(a)(1)(A) of the Immigration and Nationality Act and relating regulations as they existed prior to December 1, 1965. The regulation in effect at the time the petition was filed and adjudicated read as follows:

8 CFR

204.2 Services needed urgently; clearance order. In order for the services of an alien to be considered as needed urgently within the meaning of section 203(a)(1) of the Act, it must be established that there is an immediate need for the services of the alien and qualified persons are not available in the United States to perform such services. A United States Employment Service clearance order concerning nonavailability of qualified persons shall be attached to every submitted first-preference petition unless the petitioner has been informed by the office having jurisdiction over the place where the beneficiary's services are to be performed that a clearance order for the beneficiary's occupation is not required. A single clearance order for a specified number of first-preference petitions may be used to support the identical number of such petitions filed by the same petitioner in behalf of beneficiaries who will do the work described in the clearance order.



(This regulation was effective from August 21, 1964 to November 30, 1965).

103.2 Applications, petitions, and other documents--(a)
General. Every application, petition, or other document submitted on a form prescribed by this chapter shall be executed and filed in accordance with the instructions contained on the form, such instructions being hereby incorporated into the particular section of the regulations requiring its submission.....

counsel on appeal contends that the District Director erred in denying the petition on the ground that an Employment Service clearance order was not submitted by the petitioner and submits that the petitioner's need for the beneficiary's services should be decided by the District Director on the evidence submitted.

In support of his contention that a clearance order is simply one of many evidentiary factors to be considered by the District Director in this type case, counsel cites the court's statement on this point in the case of Flower Furniture Manufacturing Corporation vs. P. A. Esperdy, 29 F.Supp. 182 at 165. We have no quarrel with counsel on this point. We do note, however, that in the Flower case a clearance order was submitted and that the court found that the Service acted pursuant to statutory authority and resolved issues of fact against the plaintiff upon the basis of substantial evidence. The regulation in effect at the time the instant petition was filed required the submission of a clearance order unless the petitioner has been informed by the office having jurisdiction over the place where the beneficiary's services are to be performed that a clearance order for the beneficiary's occupation is not required. The record establishes that petitioner and counsel were informed by the appropriate Service officer that a clearance order was required in connection with the petition. In another decision involving this point, (requirement that a clearance order be submitted) the Seventh Circuit on May 26, 1964 held to be without merit plaintiff's contention that the Service erred in requiring that a clearance order be submitted. The Court went on to say that the Service had no choice but to follow the regulation in this respect. Hittos vs. Immigration and Naturalization Service, 332 F.2d 203.

Counsel contends that the normal procedure for the District Director to follow in a case such as this is to interview the petitioner and take a statement concerning the petition, and conduct an investigation the results of which would be made known to the petitioner in order for the latter to collect additional facts so that all would be available for a proper decision. Counsel submits that none of this was done and

For this reason the District Director had insufficient facts upon which to decide the petition.

Counsel cites several administrative decisions with the contention that the petition of his client should be considered in their context and granted. Again we have no quarrel with counsel concerning his citations. However, in reviewing the cases cited by counsel (5 I. & N. Dec. 527 and 29, 7 I. & N. Dec. 292), it is noted that in all but one case it is specifically mentioned that a clearance order was presented with the petition. In the exception (5 I. & N. Dec. 527), it is stated in the decision that "the petitioner has complied with the applicable statutes and regulations."

The regulations in effect at the time the petition was filed and adjudicated required that a clearance order be filed with a first preference visa petition unless the appropriate Service office informed the petitioner that it was not required for the beneficiary's occupation. The petitioner in the instant case was informed that a clearance order was required. Since no clearance order was submitted, the District Director had no alternative but to deny the petition. Counsel's contentions that the District Director erred in denying the petition solely on this ground is without merit and must be dismissed.


In his brief counsel points out that the words "urgent need" have been deleted from Section 203 of the Immigration and Nationality Act as amended by the Act of October 3, 1965 and states that it was Congressional intent that what was done under the old law with respect to urgent need is not a proper basis for granting or denying first preference quota. He urges that the District Director was aware of this change at the time his decision was made in the instant case and therefore the denial was in error. What counsel says about deletion of the words "urgent need" is true, however, this was not effective until December 1, 1965 and as heretofore stated this case was decided on November 30, 1965 after counsel had been granted an extended period of time within which to support the petition with a clearance order. The District Director's decision was proper since it was rendered under the statute and regulations then in effect.

Petitions filed under former Section 203(a)(1)(A) of the Act have, since December 1, 1965, been considered under subsections (3) and (6) of Section 203(a) of the amended Act. What counsel has perhaps overlooked is the new requirement in Section 212(a)(14) of the amended statute that a "certification" from the Secretary of Labor is required for aliens seeking classification as members of the professions or because of their exceptional ability in the sciences or the arts under subsection (3), or skilled or unskilled workers under subsection (6) of Section 203(a). New regulations

relating to this "certification" requirement are found in 8 CFR 204 and 29 CFR 60. It will be noted in the new regulations that there is no appeal from a decision denying a petition for the lack of a "certification" by the Secretary of Labor.

This case, including the points raised by counsel in his brief, has been carefully considered. It is concluded that the District Director had no alternative but to deny the petition. Absent a clearance order from the United States Employment Service the petition was not approvable under the statute or regulations in existence prior to December 1, 1965 nor is it approvable under the amended statute and regulations without a "certification" from the United States Employment Service. The appeal will be dismissed.

ORDER: IT IS ORDERED that the appeal be and the same is herewith dismissed.


REGIONAL COMMISSIONER
Southwest Region

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIMITRI KAPSALIS,

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellee.

NO. 21052

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

JAMES B. CUNEO
Deputy Attorney General

6000 State Building
San Francisco 94102
Telephone: 557-2081

Attorneys for Appellee

FILED

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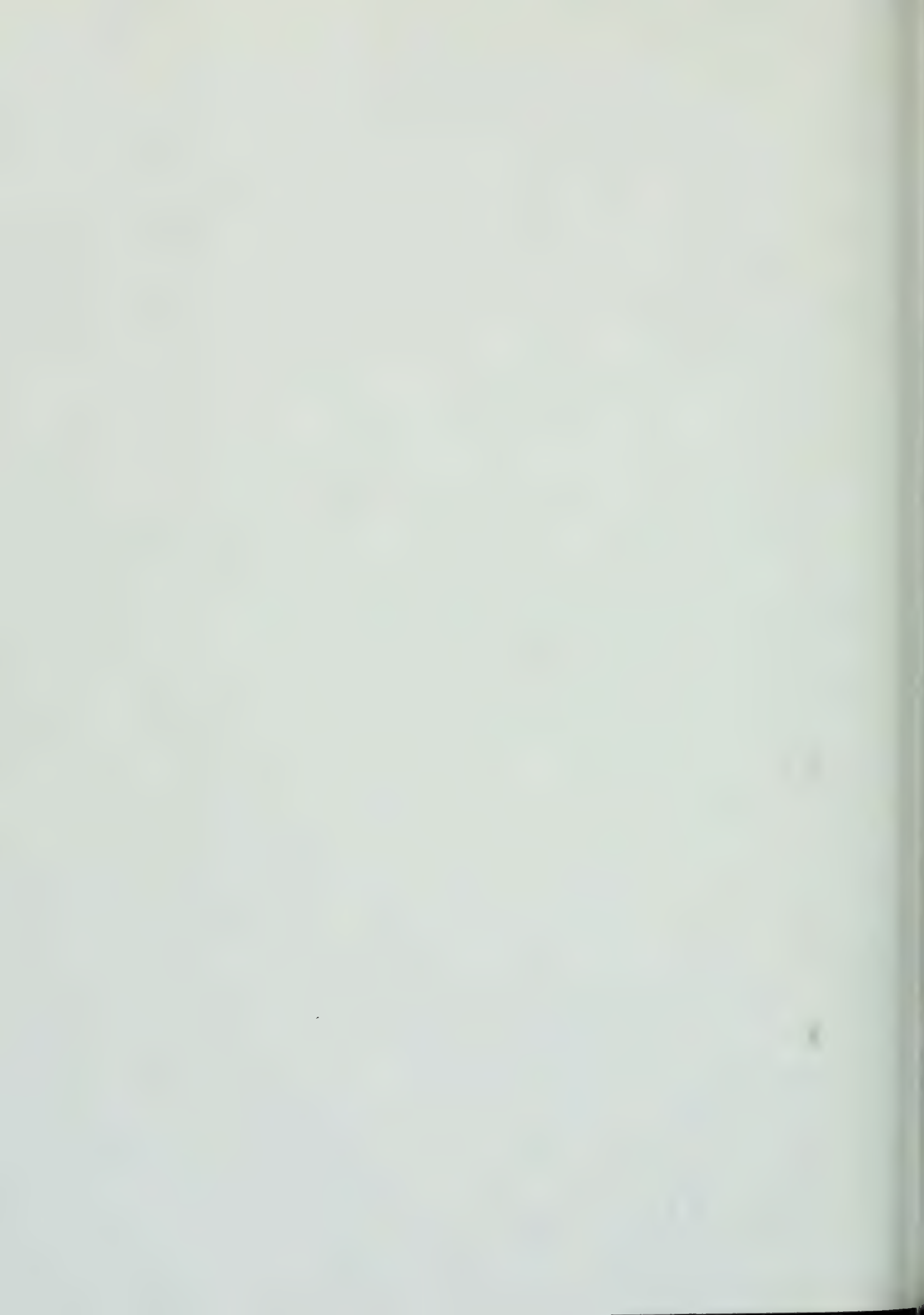


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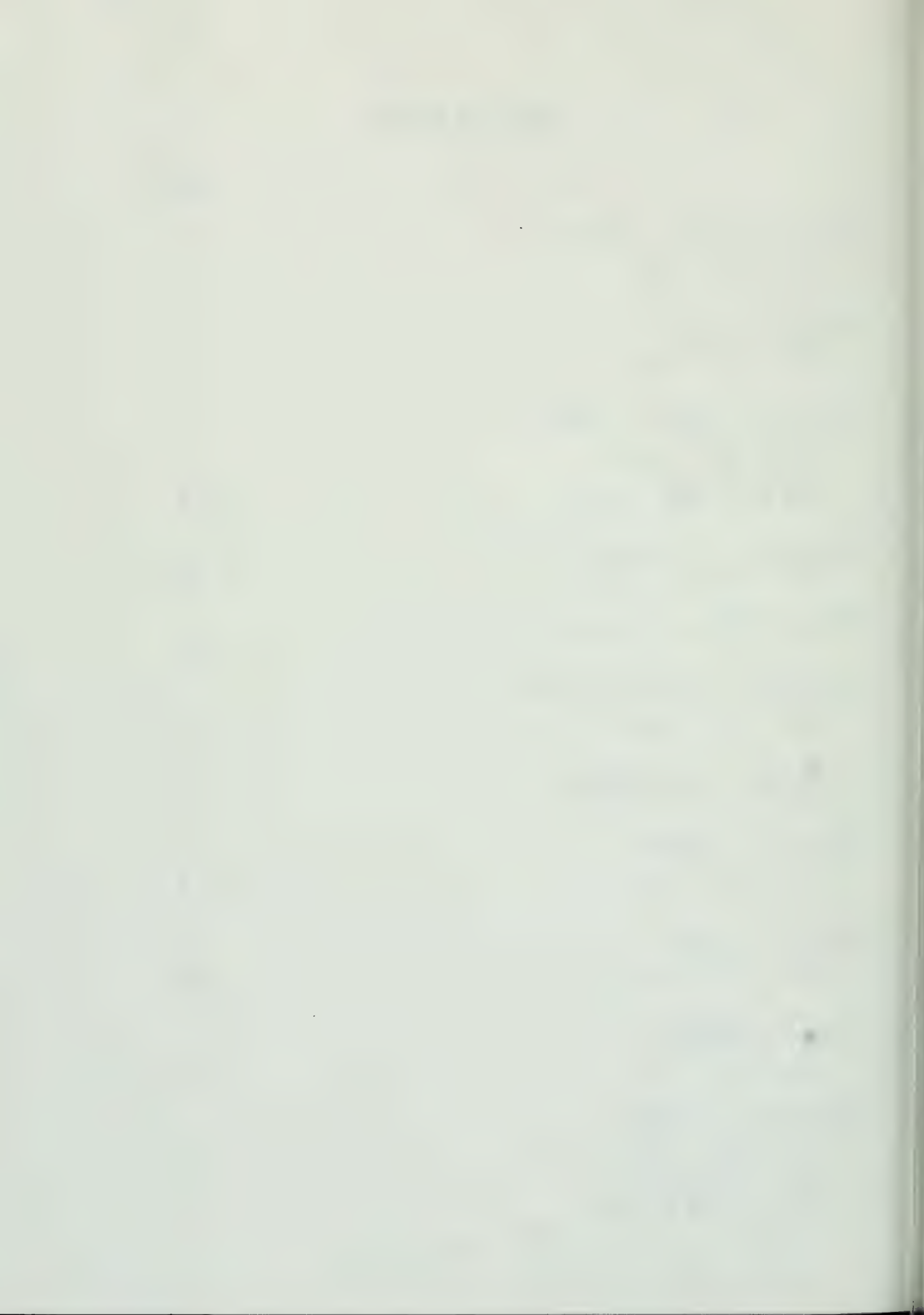
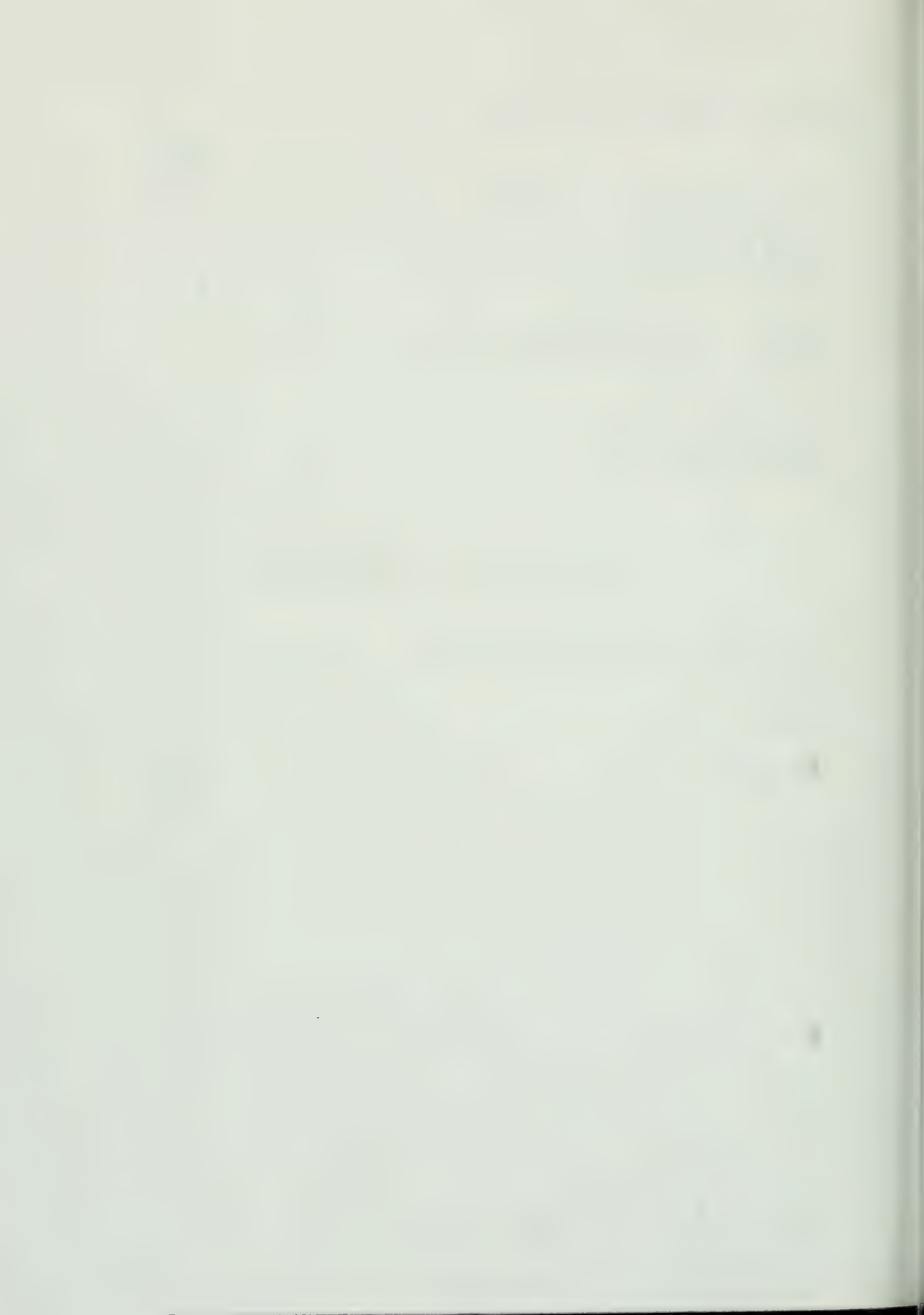


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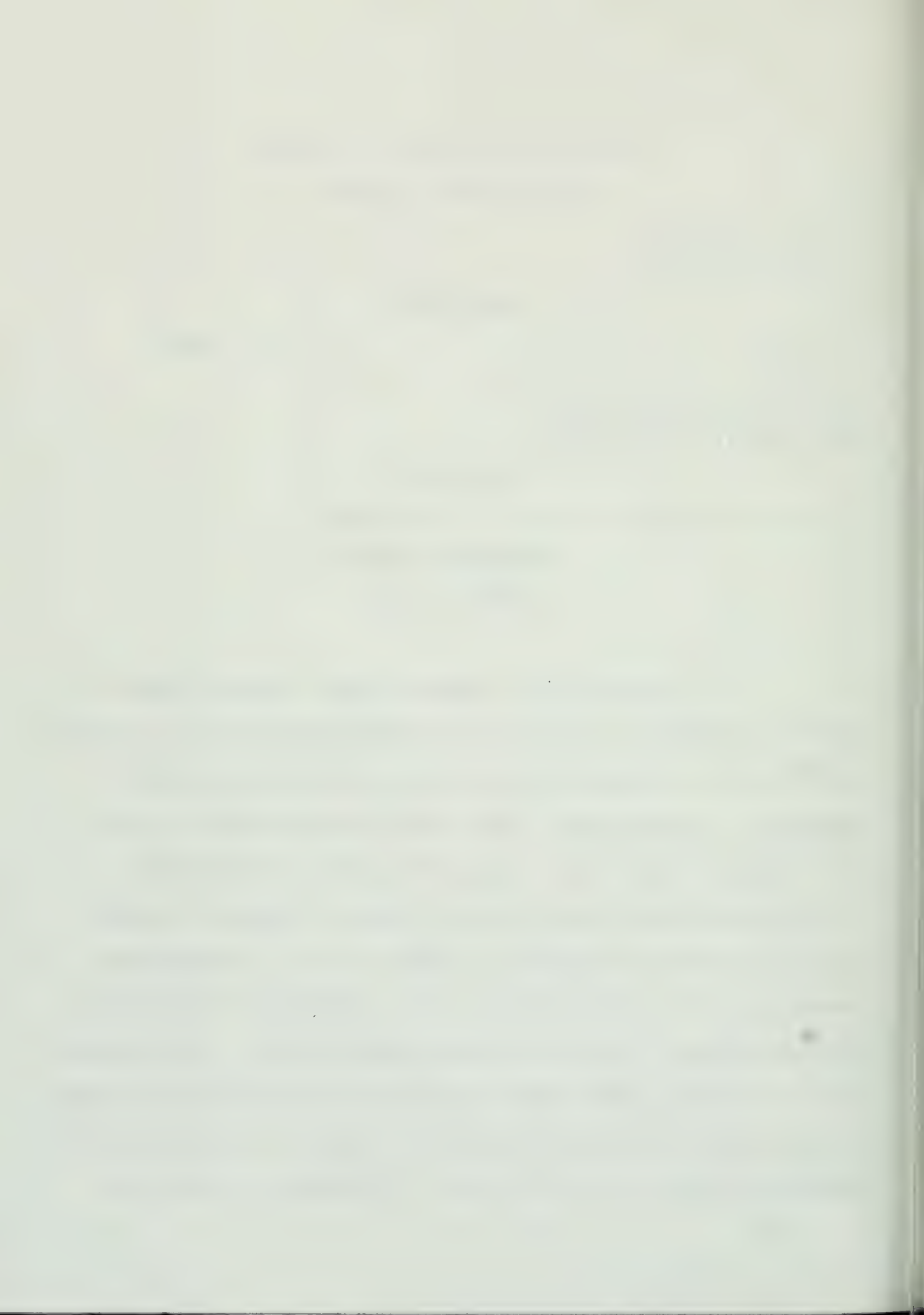
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIMITRI KAPSALIS,)	
)	
Appellant,)	
)	
vs.)	No. 21052
)	
LAWRENCE E. WILSON, Warden,)	
California State Prison,)	
San Quentin, California,)	
)	
Appellee.)	
)	

APPELLEE'S BRIEF

JURISDICTION

The order of the United States District Court for the Northern District of California denying the petition for a writ of habeas corpus, in the proceeding entitled Kapsalis v. Wilson, No. 44636, was issued January 7, 1966 (R. 19-20). Appellant's application for a certificate of probable cause and motion for leave to appeal in forma pauperis were filed April 15, 1966 (R. 21). An affidavit showing appellant was without funds necessary to prosecute the appeal was filed at the same time (R. 23). The district court certified that there was probable cause for the appeal and granted appellant's motion for leave to appeal in forma pauperis on May 17, 1966 (R. 26). Appellant invokes the



jurisdiction of this court pursuant to 28 U.S.C. § 1915 and 28 U.S.C. §2253.

STATEMENT OF THE CASE

This brief represents the initial appearance of the California Attorney General, on behalf of appellee and respondent Lawrence E. Wilson, in this matter. Appellee filed no pleadings in the court below.

Appellant was convicted on March 6, 1963, in the Superior Court for Contra Costa County, after a plea of guilty, of one count of first degree murder in violation of California Penal Code section 187 (R. 2). No appeal was taken from the conviction.^{1/}

A petition for a writ of habeas corpus was filed in the Superior Court for Marin County and denied on October 13, 1964 (R. 5, 6). The Marin court number was 41140 (R. 7). Petitions were also filed in the District Court of Appeal, First Appellate District, and the California Supreme Court, and were denied on August 11, 1965 and September 29, 1965 respectively (R. 5, 6). The numbers of these cases were Crim. 5272 in the District Court of Appeal and Crim. 9368 in the California Supreme Court (R. 7).

1. Though appellant states in the petition before the district court that he did appeal, the remainder of the petition shows that the subsequent proceedings were for habeas corpus.



Appellant is presently imprisoned in the California State Prison at San Quentin and is serving a life sentence from which he becomes eligible for parole on March 6, 1970 (R. 2).

STATEMENT OF THE FACTS

The record before the district court consisted of appellant's petition (R. 1-12) and a copy of the petition for writ of habeas corpus which had been submitted to the California Supreme Court (R. 13-17).

The petition before the district court contained allegations that prejudicial error was committed by the admission of evidence of appellant's statements elicited from him following arrest and before he had been advised of his right to counsel, that petitioner was interrogated without the aid of counsel while in a state of stupor due to barbiturates which he had taken prior to the arrest and that at no time was he advised of his rights nor the defenses available to him. The petition further alleged that at no time had medical evidence been introduced to show the nature of his competence, that he was "emotionally disturbed", that he was incapable of entering a rational plea, and that his act was mitigated by temporary insanity and a history of "instability" (R. 3-4).

The petition further indicated that petitioner had been represented by counsel at the time of arraignment

and plea and sentencing (R. 8). The remainder of the petition consisted of information concerning the various courts to which petitioner had applied for relief, a list of the purported "evidence" showing his previous record of emotional disturbance and a list of cases and citations to constitutional provisions (R. 4).

The petition for writ of habeas corpus which had been submitted to the California Supreme Court which was marked "Exhibit A" and submitted as part of the record on appeal (R. 13-17) contains substantially the same allegations. These allegations were that petitioner was interrogated without the aid of counsel for several days while in a state of stupor, that he was never advised of his constitutional rights and did not know the defenses available to him, that it was error to admit the confession taken without counsel present and that no evidence had been introduced showing his incompetence at the time and that he was incapable of entering a rational plea (R. 14-15).

SUMMARY OF APPELLEE'S ARGUMENT

I. The court is without jurisdiction and the appeal should be dismissed.

II. The petition did not state facts entitling appellant to relief in the district court.

III. Appellant deliberately bypassed state procedures for raising the issue of ineffective aid of counsel.

ARGUMENT

I

THE COURT IS WITHOUT JURISDICTION
AND THE APPEAL SHOULD BE DISMISSED

Appellant's original petition in the district court was denied January 7, 1966 (R. 19). His application for certificate of probable cause and notice of appeal was filed April 15, 1966 (R. 21). The district court certified that there was probable cause for the appeal and granted the motion for leave to appeal in forma pauperis on May 17, 1966 (R. 26). It was 98 days from the time the order denying the writ of habeas corpus was issued until appellant's notice of appeal was filed in the district court.

Title 28 U.S.C. section 2107 provides that no appeal shall bring any judgment, order or decree before the court for review unless notice of appeal is filed within 30 days after the entry of such judgment, order or decree. The section further provides that the district court may extend the time for appeal not exceeding 30 days from the expiration of the original time proscribed upon showing of excusable neglect based on failure of the

party to learn of the entry of judgement, order or decree. This requirement is also codified as Rule 73(a) of the Federal Rules of Civil Procedure, 28 U.S.C. It has long been established that the 30-day provision is applicable in habeas corpus proceedings. Poe v. Gladden, 287 F.2d 249, 250 (9th Cir. 1961); Application of Cameron, 247 F.2d 775 (9th Cir. 1957).

While appellee is reluctant to place such procedural technicalities in the path of a hearing of the issues raised by appellant, he feels duty bound to do so in light of the fact that these requirements are jurisdictional. Wagoner v. Fairview Consolidated School District No. 5, 289 F.2d 480, 481 (10th Cir. 1961), cert. denied, 368 U.S. 921 (1961); Carnes v. United States, 279 F.2d 378, 379 (10th Cir. 1960), cert. denied, 364 U.S. 846 (1960). Nor does the fact that the district court issued a certificate of probable cause and allowed appellant to proceed have any effect of giving this Court jurisdiction. Even if construed as an extention, the time allowed was greater than that specified by statute. The time limited by statute for taking an appeal from an order dismissing writ of habeas corpus cannot be extended by waiver, consent or order of the court. U.S. ex. rel. Lutz v. Ragen, 171 F.2d 788 (7th Cir. 1948), cert. denied, 337 U.S.

II

THE PETITION DID NOT STATE FACTS
ENTITLING APPELLANT TO RELIEF IN
THE DISTRICT COURT

Where the district court has dismissed a petition without the issuance of an order to show cause the question on appeal becomes whether, assuming the allegations of the petition to be true, a violation of some federal constitutional guarantee has been shown. Boyden v. Webb, 208 F.2d 201, 203 (9th Cir. 1953). It is imperative that the petition allege primary facts which show that the state prosecution departed from constitutional requirements. Schlette v. People, 284 F.2d 827 831-832 (9th Cir. 1960), cert. denied 366 U.S. 940 (1961). Conclusionary statements are insufficient and the facts must be set out "with particularity and in detail in the petition for the writ." Linden v. Dickson, 278 F.2d 755, 757 (9th Cir. 1960).

The only factual allegation contained in the petition with any degree of particularity were those alleging that prejudicial error was committed by the admission in evidence of appellant's confessions elicited while he was in a state of stupor and before any warning of his constitutional rights to remain silent and to have the assistance of counsel (R. 3-4).

As appellant was convicted on his plea of guilty, there was never any trial and no evidence of any sort was admitted against him. Escobedo v. Illinois, 378 U.S. 478 (1964), holds that where a prisoner is questioned after criminal investigation has focused upon him as a suspect, his request for counsel was denied, and he is not advised of his right to remain silent, and he confesses during the pre-trial interrogation, the confession is inadmissible as evidence. As no such statements constituted the basis of any conviction against appellant, the rule is inapplicable in this case.

The district court went even further in protecting the right of appellant and assumed that some evidence had been taken in violation of his constitutional rights. The court nevertheless determined that because of appellant's conviction was final prior to June 22, 1964 and the Escobedo rule should not be applied retroactively, there was no violation of any constitutional prohibition (R. 19-20). This position has subsequently been affirmed by the United States Supreme Court in Johnson v. New Jersey, 384 U.S. 719 (1966).

With respect to appellant's allegation that he was incompetent to enter a plea at the time it was made, and that there was thus no voluntary waiver of

his right to trial, appellee asserts that the allegation in the petition was insufficient to show that the state prosecution had departed from constitutional requirements. This allegation (R. 4) apparently asserts that there was error in the failure of prosecution to introduce evidence showing that appellant was capable of entering an intelligent plea. There is no allegation that he was in fact incapable at the time of plea or specific allegations showing that counsel should have raised this point at the time of arraignment and plea. The allegation was thus insufficient to raise the constitutional question and the district court properly disposed of it on its face. See Schlette v. People, 284 F.2d 827, 831-832 (9th Cir. 1960), cert. denied 366 U.S. 940 (1961); Linden v. Dickson, 278 F.2d 755, 757 (9th Cir. 1960).

III

APPELLANT DELIBERATELY BYPASSED STATE PROCEDURES FOR RAISING THE ISSUE OF INEFFECTIVE AID OF COUNSEL

In his opening brief, appellant brings forth the issues of denial of counsel at the pre-trial stages and denial of effective assistance of counsel for the first time in these proceedings. He asserts the denial of a constitutional right to counsel at the pre-trial

stages despite statements in his original petition that he was represented by counsel at the time of his arraignment and plea and sentencing (R. 8). He further asserts that counsel made no effort to advise him of his rights and of the defenses which would be available to the crime or to prepare any defense in appellant's behalf.

Because these contentions were not raised before the district court, the necessary factual allegation to support them are not a part of this record. It is well established that the Court of Appeal in reviewing the denial of an application for habeas corpus may consider only the record made in the trial court and cannot go outside the record for the facts. Holliday v. U.S., 244 F.2d 801, 802 (9th Cir. 1957); Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947).

Aside from the obvious lack of proper allegations to raise this issue before the district court, reference to the record shows that appellant has failed to exhaust his state remedies on this issue. Considerations on the petition for writ of habeas corpus which appellant had previously filed with the State Supreme Court of California (R. 13-17) reveals that it nowhere contains any allegations of lack of counsel at the pre-trial stages, except with regard to the Escobedo

The first part of the book is devoted to a general
introduction of the subject. The author discusses the
importance of the study and the scope of the work.
He also mentions the various methods used in the
investigation and the results obtained.

The second part of the book is devoted to a
detailed study of the subject. The author discusses
the various aspects of the problem and the
results obtained. He also mentions the various
methods used in the investigation and the results
obtained.

The third part of the book is devoted to a
detailed study of the subject. The author discusses
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obtained.

The fourth part of the book is devoted to a
detailed study of the subject. The author discusses
the various aspects of the problem and the
results obtained. He also mentions the various
methods used in the investigation and the results
obtained.

issue, or lack of effective assistance from counsel.

Appellant alleged in his original petition that he had previously raised the issues sought to be raised by this petition in the Supreme Court of California (R. 5). There is no indication that he filed more than one petition with the Supreme Court of the State. The district court was thus without jurisdiction to consider this issue even had it been properly raised. 28 U.S.C. § 2254; Fay v. Noia, 372 U.S. 391, 435 (1963).

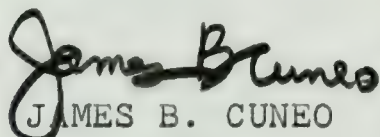
CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the district court denying the petition for the writ of habeas corpus should be affirmed.

DATED: January 13, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General


JAMES B. CUNEO
Deputy Attorney General

Attorneys for Appellee

JBC:mcf
1/13/67
65-1984

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: January 13, 1967

JAMES B. CUNEO
Deputy Attorney General

No. 21053

FEB 20 1967

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NESTOR YEROSTATHIS, aka NESTOR GEROSTATHIS,
Plaintiff-Appellant,

vs.

A. LUISI, LTD. and SHIPPING DEVELOPMENTS
CORP.,
Defendants-Appellees.

APPELLEES' BRIEF

LILICK, MCHOSE, WHEAT, ADAMS & CHARLES
GORDON K. WRIGHT
KENNETH R. CHIATE
600 South Spring Street
Los Angeles, California 90014
Attorneys for Appellees

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FEB 17 1967

Jeffries Banknote Company, Los Angeles — MA 7-9514

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No. 21053

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NESTOR YEROSTATHIS, aka NESTOR GEROSTATHIS,
Plaintiff-Appellant,

vs.

A. LUISI, LTD. and SHIPPING DEVELOPMENTS
CORP.,
Defendants-Appellees.

APPELLEES' BRIEF

STATEMENT OF THE CASE

Appellant is a Greek seaman [Tr. 16]*. The vessel M.V. ARGO ELLAS is registered under the laws of the Kingdom of Greece [Tr. 16]. It is owned by Appellee SHIPPING DEVELOPMENTS CORP., a Panamanian corporation, with its principal office in Piraeus, Greece [Tr. 16]. Appellee A. LUISI, LTD. is a British corporation and is the general agent of SHIPPING DEVELOPMENTS CORP. [Tr. 16]. None of the shareholders of either SHIPPING DEVELOPMENTS CORP. or A.

* References, unless otherwise noted, are to the Transcript of Record.

LUI SI, LTD. are citizens of the United States, and neither Appellee has any office or other place of business in the United States [Tr. 36, 45].

On June 17, 1963, Appellant signed a Contract of Employment as Second Engineer with the vessel's agents at Piraeus, Greece [Tr. 39]. The Contract provided that for claims due to accident, "the Law Courts of Athens" would be "solely competent" [Tr. 16, 39]. He signed Ship's Articles in standard Greek form when he joined the vessel at Antwerp, Belgium on June 23, 1963 [Tr. 36]. The aforementioned Contract of Employment and Ship's Articles were both written in the Greek language [Tr. 16].

Appellant was injured while M.V. ARGO ELLAS was at Chittagong, Pakistan on October 8, 1963 [Tr. 16, 17]. On October 10, 1963, he was repatriated by air from Chittagong to Greece, where he underwent treatment at the expense of SHIPPING DEVELOPMENTS CORP. [Tr. 17].

RELEVANT STATUTE

28 U.S.C.A. Section 1404(a):

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

ARGUMENT

I

28 U.S.C.A. 1404(a) DOES NOT PRECLUDE A DISTRICT COURT FROM DISMISSING A LIBEL BROUGHT BY A FOREIGN SEAMAN.

Without exception, courts confronted with suits between foreigners have unanimously held that Section 1404(a) does not deprive a district court of its inherent power to decline jurisdiction and dismiss an action under the common-law doctrine of *forum non conveniens*. See *e.g. Zouras v. Menelaus Shipping Co.*, 336 F.2d 209 (1st Cir. 1964); *Koziol v. THE FYLGIA*, 230 F.2d 651 (2d Cir.), *cert denied*, 352 U.S. 827 (1956); *Industria E. Comercio de Minerios v. Nova Genuesis Societa*, 310 F.2d 811 (4th Cir. 1962); *Brillis v. Chandris (U.S.A.) Inc.*, 215 F. Supp. 520 (S.D.N.Y. 1963); *Hatzoglou v. Asturias Shipping Company, S.A.*, 193 F. Supp. 195 (S.D.N.Y. 1961).

A. Appellant's Authorities Do Not Support His Contention.

Appellant apparently misinterprets the Supreme Court, and consequently misleads this Court when he states that the Supreme Court in *Norwood v. Kirkpatrick*, 349 U.S. 29, "clearly held" that the remedy of dismissal "was eliminated" by the passage of Section 1404(a) [Appellant's Brief, page 4].

What apparently misled Appellant was the Court's language to the effect that the harsh consequence of dismissal — the only remedy available to a district court

before the passage of Section 1404(a) — was no longer required when the forum was inconvenient, since Section 1404(a) provided for the less severe penalty of transfer *where such transfer was possible*. In the sentence immediately following that portion quoted by Appellant, the Supreme Court said that by Section 1404(a) Congress “intended to permit courts to grant transfers upon a lesser showing of inconvenience.” 349 U.S. at 32. However, the court did not say, nor even by the most stretched interpretation imply, that a district court *could not* dismiss an action where dismissal was appropriate. The court merely implied that a district court did not have to dismiss, but could instead transfer. To that extent, “the harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in Section 1404(a) for transfer.” 349 U.S. at 32.

It was the *necessity* of dismissal, and not the *possibility*, of it, that was eliminated by Section 1404(a). The effect of Section 1404(a) on the common-law doctrine of *forum non conveniens* was succinctly stated by Danaher, C. J., in *Gross v. Owen*, 221 F.2d 94, 96 (D.C. Cir. 1955):

“But, Appellants argue, section 1404(a) operates to *deprive* the District Court of power to dismiss when the doctrine of *forum non conveniens* is invoked. The law is exactly the reverse, for the statute took nothing from the courts. Rather it conferred a new and additional authority to transfer a proper case where previously the court had no alternative but to dismiss.” (Citations omitted)

However, as expressly required by the terms of Section 1404(a), transfer is only available under certain circumstances — where there exists another district court where the action could have been brought. See *Hoffman v. Blaski*, 363 U.S. 335 (1960). In the instant case, no such district court exists. Thus, transfer is impossible, and the court is left with the common-law remedy of dismissal when the plaintiff has chosen a *forum non conveniens*.

On Pages 4 and 5 of Appellant's Brief it is stated that the "most persuasive and most authoritative decisions now agree that . . . dismissal as a remedy for forum non conveniens has been abolished." In support of this contention nine cases are cited. However, not one of the cases cited stands for the proposition urged by Appellant. None held, or even intimated, that dismissal as a remedy was abolished by Section 1404. Further, only *North Branch Products v. Fisher*, 284 F.2d 611 (D.C. Cir. 1960) dealt with facts even remotely similar to those with which this court is concerned, that is, where there existed no other Federal forum to which the case could be transferred. However, even *North Branch Products* does not support Appellant's contention, since that case arose under the United States Patent Acts and the court merely concluded that no "more suitable or convenient forum" existed, 284 F.2d at 613, and hence the district court should have retained jurisdiction over the patent claim. All of the other cases cited by Appellant concerned situations where there was a more convenient Federal forum available, where defendant had failed to satisfy its burden in showing that the forum selected by plaintiff was inconvenient, or where there was no juris-

diction over the defendant. In three of the cases defendant's motion to transfer was granted.

**B. The Courts Are In Unanimous Agreement That
Section 1404(a) Did Not Eliminate Dismissal As
A Remedy For Forum Non Conveniens.**

In addition to the cases cited by the Court below and by Appellees in their previous memoranda, most all of which Appellant attacks as not having considered the issue in question, the following cases have all either expressly decided or approvingly recognized the proposition that Section 1404(a) did not abolish dismissal as a remedy:¹

De Sairigne v. Gould,

83 F.Supp. 270, 273 (S.D.N.Y. 1949):

“The plaintiff insists, however, that Section 1404(a) of the new Judicial Code, 28 U.S.C.A. Section 1404(a) has codified the law of forum non conveniens so as to limit its application to cases which are capable of being transferred from one federal district to another . . . I think this contention is plainly unsound, for it would strip a federal court of its inherent power to refuse jurisdiction in cases which should not have been brought here but should have been brought in a foreign jurisdiction . . .

¹ For other cases granting defendant's motion to dismiss under the doctrine of *forum non conveniens*, see *Hendricks v. Alcoa Steamship Co.*, 206 F.Supp. 693 (S.D. Miss. 1962); *LeClair v. Shell Oil Company*, 183 F.Supp. 255 (S.D. Illinois 1960); *Agrio v. Oceanic Operations Corp.*, 1962 A.M.C. 173 (S.D. N.Y.); *Industria E. Comercio de Minerios v. Nova Genuesis Societa*, 310 F.2d 811 (4th Cir. 1962).

There is nothing in the language or history of the section to indicate that Congress had any such intention.”

Latimer v. S/A Industrias Reunidas F. Matarazeo,
91 F.Supp. 469, 471 (S.D.N.Y. 1950):

“Section 1404(a) has not limited the application of forum non conveniens to cases which are capable of being transferred from one Federal district to another. Otherwise, it would be a denial of Federal court’s inherent power to refuse jurisdiction in cases which should not have been brought in the United States, but rather in the courts of a foreign jurisdiction.”

Vanity Fair Mills v. T. Eaton Co.,
234 F.2d 633, 645 (2nd Cir. 1956):

“The doctrine of forum non conveniens is now firmly established in federal law. (Citations omitted). 28 U.S.C. Section 1404(a) has, in effect, codified and replaced this doctrine whenever the more convenient tribunal is a United States District Court where the action ‘might have been brought.’ (Citation omitted.) But the federal courts retain the inherent power to refuse jurisdiction of cases not within section 1404(a) — cases which should have been brought in a foreign jurisdiction, rather than in the United States.”

Glicken v. Bradford,
204 F.Supp. 300, 304 (S.D.N.Y. 1962):

“However, despite the statutory embodiment of the rule (of forum non conveniens), there are cases

where the court may still properly apply the doctrine; for example, where the action should have been brought outside of the United States (citations omitted) or where transfer could be effected only to a state court and not to a district court, so that section 1404(a) could not possibly be applicable.”

Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A.
(*Cruzeiro*), 232 F.Supp. 433, 442 (S.D.N.Y. 1964):

“Dismissal on *forum non conveniens* grounds is not an impossibility when the action should have been brought outside the United States.”

II

THE COURT BELOW PROPERLY DECLINED TO EXERCISE ITS DISCRETIONARY JURISDICTION

A. If The Maritime Law of The United States Does Not Apply, Jurisdiction Was Properly Declined.

Referring to the trial court’s unqualified discretion to dismiss admiralty suits between foreigners, the Supreme Court in *Canada Malting Co. v. Patterson Steamships Ltd.*, 285 U.S. 413, 420 (1932) referred to its holding in *Langhes v. Green*, 282 U.S. 531 (1931), and held:

“ ‘Admiralty courts . . . have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, “the question is one of discretion in every case and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum”. The *Maggie Hammond*, 9 Wall 435, 457 The Belgen-

land 114 U.S. 355, 368, *Charter Shipping Co. v. Bowring, Jones and Tidy*, 281 U.S. 515, 517.’ ”

It is well recognized that justice is best accomplished by remitting the parties to the forum whose laws are applicable. This principal was recognized by the Second Circuit Court of Appeals when it approved a declination of jurisdiction by saying:

“There is no ground for holding the trial judge in error in his conclusion that, since the Swedish law so directly controls, the libellant’s rights would be adequately, if not better, adjudicated in Swedish tribunals.” *Koziol v. THE FYLGIA*, 230 F.2d at 652.

B. The Maritime Law Of The United States Does Not Apply.

In *Lauritzen v. Larsen*, 345 U.S. 571, 97 L.Ed. 1257 (1952), the Supreme Court succinctly listed the connecting factors which must be considered as significant in determining the law applicable to a maritime tort. The factors listed by the Court were as follows: Place of the wrongful act; Law of the flag; Domicile of the injured; Allegiance of the defendant shipowner; Place of contract; Accessibility of foreign forum; and, Law of the forum.

An application of the Supreme Court's test to the facts in this case clearly reveals an overwhelming preponderance in favor of Greek Law.²

C. The "Flag Of Convenience" Doctrine Is Inapplicable.

On page 18 of his brief, Appellant states that "it is obvious that the flag and corporate ownership of the vessel herein are registrations and incorporations 'of convenience' ", and that British, not Greek, law should apply. Appellant's attempt to bring this case within the "flag of convenience" doctrine first enunciated by *Bartholomew v. Universe Tank Ships, Inc.*, 263 F.2d 437 (2nd Cir.), *cert denied*, 359 U.S. 1000 (1959), must fail for several reasons.

First, the "flag of convenience" doctrine originated as an attempt to limit the dominating importance of the law of the flag which was recognized by the Supreme Court in *Lauritzen v. Larsen*, *supra*.³ The purpose of

² Appellant was injured in Pakistan. The vessel is registered in Greece and is manned by Greek subjects. The Appellant is domiciled in Greece. The vessel is owned by a Panamian corporation with its principal office in Piraeus, Greece. The corporation is owned by Greek citizens. Appellant's Contract of Employment was signed in Greece, was written in Greek and provided that only Greek courts would be competent to litigate claims arising from an accident or illness. Appellant does not contend, nor do the facts permit a contention, that Greek courts are inaccessible to Appellant. As evidenced by *Lauritzen*, it is not contrary to the laws or public policy of the United States to remit injured foreign seamen to their home forum.

³ In *Lauritzen*, the court said: "Perhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag." 345 U.S. at 584.

the doctrine was solely to establish an approach for deciding whether a seaman's claim was to be governed by the law of the United States or by the law of the flag flown by the vessel, and to determine whether the vessel owner sought to circumvent United States' law by obtaining foreign registry. The doctrine is clearly inapplicable to a case, such as this one, where Appellant concedes that United States law does not apply [Tr. 4; Appellant's Brief 2, 18].

Second, even if the doctrine is applicable, it would not affect the court's decision since there is a conspicuous absence of any contacts between the transaction involved and the United States. Third, the argument for application of British law should be addressed to the British courts whose concern with such charges would be paramount. Fourth, the claim for application of British law is itself a strong argument in support of the court's declination of jurisdiction, since by declining jurisdiction the court allows the plaintiff to bring his action in the foreign forum he believes appropriate and whose law he wants applied. Therefore, even if English law was applicable (an unwarranted assumption in view of the absence of significant contacts with England), this would certainly not be a factor which should compel a U. S. District Court to entertain jurisdiction.

In *Tjonaman vs. A/S GLITTRE*, 340 F.2d 290 (2nd Cir.), *cert. denied*, 381 U.S. 925, *rehearing denied*, 382 U.S. 873 (1965), the Second Circuit discussed the "flag of convenience" doctrine it had earlier originated. In that case, a Dutch national and legal resident alien of the United States signed on as a member of a Norwegian

owned and registered vessel. He had signed standard form Norwegian Shipping Articles, and was injured about a month later when the vessel was in Ghanaian waters. The Second Circuit affirmed the dismissal of the libel and held that the district court correctly ruled that Norwegian law applied and that the libelant should have sought relief in Norwegian, and not American, courts.

D. Greece Is The Most Convenient Forum.

Immediately following his accident, Appellant was repatriated by air to Greece [Tr. 16, 17]. Upon his arrival at Greece he was met by a Greek doctor who immediately performed an operation [Tr. 17]. All maintenance and expenses thereof were paid by Appellees [Tr. 17]. In view of these circumstances, the comments of the court in *Giatalis v. S/T DARNIE*, 171 F.Supp. 751 (S.D. Maryland, 1959) are of interest. In that case, a Greek seaman aboard a Liberian vessel was injured outside the three mile limit of the Florida coast. He libeled the ship for personal injuries, and subsequently added a claim for wages due. In declining jurisdiction of his personal injury claim, the court said:

“Most of the witnesses on the issues of unseaworthiness, negligence, failure to supply medical attention on the ship, and libelant’s present condition are Greeks, living in Greece or employed on ships all over the world. Most of them speak Greek and not English. It is obvious that testimony, in court or by deposition of Greeks questioned by Greeks in Greek, will be better understood by a Greek Judge than translations of such testimony would be understood by this court. Moreover, the important wit-

nesses will not be subject to process issuing out of this court; many of them will be subject to process in Greece.” 171 F.Supp. at 754.

In the instant case, all of the witnesses, both as to the accident itself and as to the extent of Appellant’s damages will be Greek. The cost and inconvenience attendant to both the court and to Appellees, all of which the court can judicially notice, are sufficient considerations to justify this court in declining jurisdiction on the grounds of *forum non conveniens*.

E. Appellant Agreed To Have His Rights Determined by Greek Courts According To Greek Law.

An independent reason for declining jurisdiction in this case, apart from the doctrine of *forum non conveniens*, is that Appellant signed a written contract with Hellenic Marine Agencies “as agents of the M.V. ARGO ELLAS” which expressly stipulated that all terms of his employment would be governed by the Greek collective agreement and that the courts of Athens would be solely competent [Tr. 39]. This contract was freely entered into by both parties and is fully enforceable under its clear and unambiguous terms. The agreement and each of its provisions should be recognized and effectuated by this court.

In *Hatzoglou v. Asturias Shipping Company, S/A*, *supra*, the court declined jurisdiction and made the following comments about a similar contract between a seaman and the vessel owners at Piraeus:

“An agreement by a Greek chief officer, signed in Greece, written in Greek, to apply Greek law is

fully valid. See *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254, upholding a similar agreement where the American contacts were far more numerous than in the case at bar.” 193 F.Supp. at 197.

F. The Case Law Clearly Supports A Declination Of Jurisdiction.

A case which is factually similar to the case at bar where the court declined to exercise its jurisdiction on the grounds of *forum non conveniens* and on the additional ground that the plaintiff had agreed to look to Greek law is *Brillis v. Chandris (U.S.A.), Inc.*, 215 F.Supp. 520 (S.D.N.Y. 1963). In *Brillis*, the plaintiff was a subject and resident of the Kingdom of Greece. While at Piraeus, Greece, he agreed to serve on board a Liberian vessel, and signed an employment contract to this effect with a Greek corporation not a party to the suit but who was acting as agent for one of the defendants. The agreement provided that any disputes arising from the contract would be governed exclusively by Greek law, and that the courts of Greece would have exclusive jurisdiction. Plaintiff subsequently joined the vessel and signed ship's articles in France. While the vessel was proceeding from Yokohama, Japan, to San Pedro, California, the plaintiff was injured. Upon his arrival at San Pedro, California, he was repatriated to Greece. Plaintiff set up causes of action under United States, Panamanian and Liberian law. The defendants urged three grounds for dismissal: (1) Inapplicability of the Jones Act; (2) An agreement to look to the courts of Greece; and (3) *Forum non conveniens*. The court

carefully analyzed the facts of the case, agreed with each of defendant's grounds for dismissal, and then dismissed the libel.⁴

⁴ "The wrongful act was committed on the high seas; the ship flies the flag of Liberia; the injured owes allegiance to Greece; the allegiance of the owner is foreign no matter which defendant is deemed the true owner . . . ; the employment contract was executed in Greece and the Ship's Articles signed in France. . . .

"Viewing all the contacts of this maritime tort, both with the United States and foreign states, and giving each its appropriate weight and significance, it is clear that such contacts as there are with the United States are at best minimal and thus insufficient for the application of the Jones Act. (Citations omitted.)

"The second defense raised by defendants seeks to invoke the doctrine of *forum non conveniens* and is addressed to the discretion of the Court. It is unnecessary to set forth anew the factual grounds upon which the Jones Act was found to be inapplicable. All are relevant in determining whether to retain jurisdiction over this controversy. In addition, several other matters may here be given weight which are inappropriate in the context of the Jones Act. (Citation omitted.)

"These additional considerations consist of the following: Plaintiff is Greek and does not speak English. All witnesses to the accident are likewise Greek, residing in that country and speaking only Greek. . . .

"In a situation factually similar to the instant one, the court of appeals of this circuit said: 'It is *prima facie* undesirable that an overburdened district court should conduct a trial in a personal injury action between foreigners, with all the evidence on the issue of liability and much of the evidence on damages given in a foreign tongue by witnesses equally or more available in the foreign forum, and with reliance having to be placed on expert testimony as to the governing law, when, as here, an adequate remedy is available in the country where both parties reside and to which the plaintiff will return.' *Conte v. Flota Mercante Dell Estado*, 277 F.2d 664, 667 (2nd Cir. 1960).

"It should be pointed out that the employment contract signed by the plaintiff agreeing to look solely to Greek courts

Another recent case in which a Greek seaman was remitted to the courts of Greece, was *Zouras v. Menelaus Shipping Co., Ltd.*, 336 F.2d 209 (1st Cir. 1964).⁵ In *Zouras*, a Greek seaman on a Liberian flag vessel owned by a Liberian corporation was injured while the vessel was anchored in Boston harbor in the course of a voyage from Italy to Japan. He was taken to the United States Public Health Service Hospital in Boston for treatment and was then repatriated to Greece. The court reviewed the facts and held:

“The libellant is a Greek citizen residing in Greece who has returned to his native country. Moreover the law of the parties’ choice is that of Greece, and, for what it may be worth, that was the place of contracting. On the facts of this case we cannot see that any injustice whatever would result in relegating the libellant to his home forum for determination of whatever legal rights he might have.” 336 F.2d at 211.

and Greek law is fully valid. The American contacts must be substantial before a court will declare such an agreement void as against public policy. (Citing *Lauritzen v. Larsen* and *Hatzoglou v. Asturias Shipping Co.*, *supra*.)

“In light of all the factors discussed above, it is evident that this court should exercise its discretion and decline jurisdiction on the grounds that this district is not the proper forum and Greece is. Plaintiff may then look to a Greek tribunal and Greek law as he agreed to when he accepted employment on the ANGELIKI II.” 215 F.Supp. at 522, 523, 524.

⁵ *Accord, Hatzoglou v. Asturias Shipping Company, S.A.*, *supra*, where the court declined jurisdiction of a libel brought by a Greek national against a Panamanian corporation.

Also recognizing the principle that the district court should refuse jurisdiction in admiralty suits between foreign nationals is *Koziol v. THE FYLGIA* 230 F.2d 651, (2nd Cir. 1966). In that case a Polish merchant seaman signed shipping articles in Argentina to serve aboard a Swedish vessel, and was injured while at sea. The Second Circuit affirmed the district court's dismissal on the ground that since the Swedish law so directly controlled, the plaintiff's rights would be better adjudicated in Swedish tribunals.

Thus, those cases which the court should look to for guidance — cases involving claims by foreigners against foreigners for injuries arising on the high seas — are unequivocal in their unanimous conclusion that justice is best effectuated by relegating the plaintiff to his home forum. This Court should, as have the other circuit courts that have decided the issue, make it clear that district courts are not the appropriate forum for suits between foreigners residing and incorporated in foreign jurisdictions.

G. Practical Considerations Justify A Declination Of Jurisdiction.

If this court establishes a policy of accepting jurisdiction in cases of this type, the end result will be that a seaman of any country will have only to obtain service over a defendant vessel owner in the United States in order to bring his action. Our courts, the dockets of which are already crowded, will then have the problem of determining what nation's laws to apply, interpreting that nation's laws, and then applying it.

The possibility of a court calendar congested with suits between foreigners for personal injuries received aboard foreign flag vessels should be avoided. Thus, for this additional reason, jurisdiction in this case should be declined.

CONCLUSION

The District Court properly exercised its discretion in declining jurisdiction in this case. The decision should be affirmed.

Respectfully submitted,

LILICK, MCHOSE, WHEAT, ADAMS & CHARLES

GORDON K. WRIGHT

KENNETH R. CHIA TE

By KENNETH R. CHIA TE

Attorneys for Appellees

CERTIFICATE OF FILING ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KENNETH R. CHIATE

Subscribed and sworn to
before me this day of
 1967

Notary Public in and for
said County and State

NO. 21,054

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

□

RONALD J. ARRIAS,

Petitioner,

v.

THE STATE OF CALIFORNIA AND
THE UNITED STATES OF AMERICA,

Respondents

RESPONDENT'S BRIEF

CECIL F. POOLE
United States Attorney

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: 556-7633

Attorneys for Respondent

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The Court approved petitioner's request that his petition for judicial review of deportation be considered his opening brief.

Petitioner is an alien Dutch citizen, age 23 in 1966, who entered the United States at San Juan, Puerto Rico, March 19, 1954.

On December 18, 1964 he was convicted, after trial in the Superior Court of the State of California in and for the County of Los Angeles, of the crime of violation of Section 11530.5 of the Health and Safety Code (R., pp. 22 and 24). The Court fixed the minimum term at six months, pursuant to Section 1202(b) of the California Penal Code.

The order to show cause in deportation proceedings under Section 242 of the Immigration and Nationality Act (8 USC 1252) was dated April 27, 1965, and ordered petitioner to appear for hearing on May 4, 1965, and charged deportability pursuant to "Section 241(a)(11) (8 USC 1252(a)(11)) in that you at any time have been convicted of a violation of any law or regulation relating to the illicit possession of marihuana in violation of Section 11530.5 of the California Health and Safety Code."

The hearing was held at the Correctional Training Facility, Soledad, California, on May 4, 1965. The Special Inquiry Officer delivered an oral statement of his decision (R., p. 16), and

petitioner acknowledged that he understood the decision. He was told that "if you are not satisfied with this decision you may appeal to the Board of Immigration Appeals in Washington, D. C." He asked if he could leave this decision till later. He was informed, "Yes, you may." He was served with three copies of Form I-290A, and told he had ten days from May 4, 1965 to enter his appeal.

No appeal was filed to the Board of Immigration Appeals. On May 13, 1965 the respondent mailed to petitioner Notice of Country to Which Deportation Has Been Directed and Penalty for Re-entry Without Permission, "Exhibit A" to Petition.

This notice did not arouse petitioner to appeal.

On January 13, 1966 petitioner addressed a letter to Mr. E. A. McFadden (R., p. 7).

On January 24, 1966 petitioner's letter was referred to Special Inquiry Officer Sipkin, with the suggestion that it be considered as a motion to reopen the deportation proceeding (R., p. 6).

The exchange of correspondence between Mr. Williams and Mr. Sipkin then followed, which established for the record that petitioner had not appealed his conviction.

On January 31, 1966 the Special Inquiry Officer made his decision denying the motion to reopen. Notice of Decision was mailed certified mail, return receipt requested, on the same date (R., p. 1). This notice enclosed copies of Form I-290A, Notice of Appeal, and informed petitioner that the decision is final unless appeal is taken to the Board of Immigration Appeals, by returning to respondent on or before February 14, 1966 Form I-290A, properly executed, together with a \$25 fee.

Respondent did not appeal. The petition for review was docketed by the Clerk of this Court on June 24, 1966.

This Court has consistently dismissed petitions for review filed under Section 106(a) of the Act for failure to exhaust administrative remedies by appeal to the Board of Immigration Appeals.

Siaba-Fernandez v. Rosenberg, 9 Cir.
302 F.2d 139

Mai Kai Fong v. INS, 9 Cir.
305 F.2d 239

Murillo-Aguilera v. INS, 9 Cir.
313 F.2d 141

Raymond Rodriguez-De Leon v. INS, 9 Cir.
324 F.2d 311

Samala v. INS, 5 Cir.
336 F.2d 7, 11

In Samala the Court noted:

"In the hearing before the special inquiry officer, it was made emphatically clear to petitioner that he had a right to appeal the deportation order to the Board of Immigration Appeals within ten days after its rendition. Petitioner was even given an appeal form, partially filled out, for his use should he decide to appeal."

Likewise, petitioner in this case was fully advised of his right to appeal, and the time, both as to the original decision and the denial of the motion to reopen.

Assuming petitioner had exhausted his administrative remedies, this Court has jurisdiction to review the final order of deportation.

QUESTIONS

Was petitioner accorded a fair hearing and due process?

Is the order of deportation supported by reasonable, substantial and probative evidence, that is clear, unequivocal and convincing?

ARGUMENT

In his petitioner's brief, petitioner presents a number of contentions.

Contention I - Paragraph IV - Right to Counsel

Deportation proceedings are civil, not criminal.

Fong Yue Ting v. INS
149 US 698

Harisiades v. Shaughnessy
342 US 580

Galvan v. Press
347 US 522

Ben Huie v. INS, 9 Cir.
349 F.2d 1014

Fuentes-Torres v. INS, 9 Cir.
344 F.2d 911

Nason v. INS, 2 Cir.
370 F.2d 865

Ah Chiu Pang v. INS, 3 Cir.
368 F.2d 637

Petitioner states that he finished high school (R., p. 15). He clearly indicated he understood why he was appearing at the hearing of May 4, 1965; that he understood he was entitled to be represented by an attorney at no expense to the Government (R., p. 11). He stated he was willing to proceed without counsel. There is no indication that he did not clearly understand.

Petitioner has referred to 28 USC 1915, and would argue that he has an absolute right to the appointment of counsel.

Appointment of counsel in a civil case is, as is the privilege of proceeding in forma pauperis, a matter within the discretion of the district court. It is a privilege and not a right.

U. S. ex rel Gardner v. Madden, 9 Cir.
352 F.2d 792

8 USC 1252(b)(2), Section 242(b)(2) of
the Act states:

"the Attorney General shall prescribe
[regulations]. Such regulations shall
include requirements that--
(2) the alien shall have the privilege
of being represented (at no expense to
the Government) by such counsel,
authorized to practice in such proceed-
ings, as he shall choose;"

8 USC 1362, Section 292 of the Act, states:

"RIGHT TO COUNSEL
"Sec. 292. In any exclusion or deporta-
tion proceedings before a special inquiry
officer and in any appeal proceedings
before the Attorney General from any
such exclusion or deportation proceedings,
the person concerned shall have the
privilege of being represented (at no
expense to the Government) by such counsel,
authorized to practice in such proceedings,
as he shall choose."

In any event, the presence or absence of
counsel would involve the question of due process.

Failure to have counsel, if error, like
other errors, may not be prejudicial.

Madokoro v. Del Guercio, 9 Cir.
160 F.2d 164

Immigration Law and Procedure
Gordon and Rosenfeld
§1.23(a) and §5.9(d)

De Bernardo v. Rogers, 2 Cir.
254 F.2d 81;
cert. den. 358 US 816

Petitioner was fully accorded due process, even to the extent that his untimely letter of January 13, 1966 was referred to the Special Inquiry Officer with the request that it be considered a motion to reopen. The denial of the motion accorded to petitioner a second opportunity to appeal to the Board of Immigration Appeals, which he did not do.

Contention II - Law Has Been Misread,
And Inaccurately Applied.

Though not so stated, petitioner's contention would appear to be founded upon Section 241(a)(4) (8 USC 1251(a)(4)), as the applicable statute pursuant to which he is deportable.

He has been found deportable pursuant to Section 241(a)(11) (8 USC 1251(a)(11)).

Expulsion must be ordered for a single conviction in the United States, at any time, irrespective of the manner of the alien's entry.

Rabang v. Boyd
353 US 427

Mulcahy v. Catalanotte
353 US 692

Marcello v. Bonds
349 US 302

Contention III - Double Jeopardy

Respondent refers to the cases cited above as dispositive of this contention.

CONCLUSION

Respondent respectfully submits:

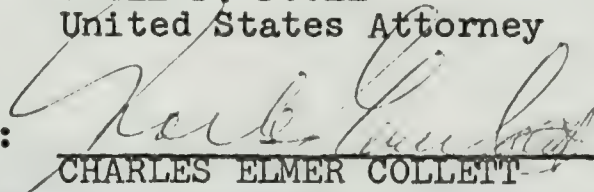
1. The petition should be dismissed, in that petitioner did not exhaust his administrative remedies.

2. Petitioner was accorded a fair hearing and due process, and the record is clear, unequivocal and convincing, in support of the order of deportation.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By:



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent
United States of America

DATED:
April 7, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

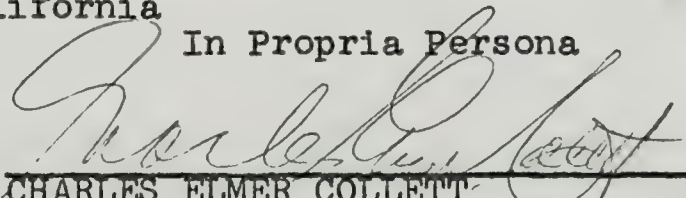
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to:

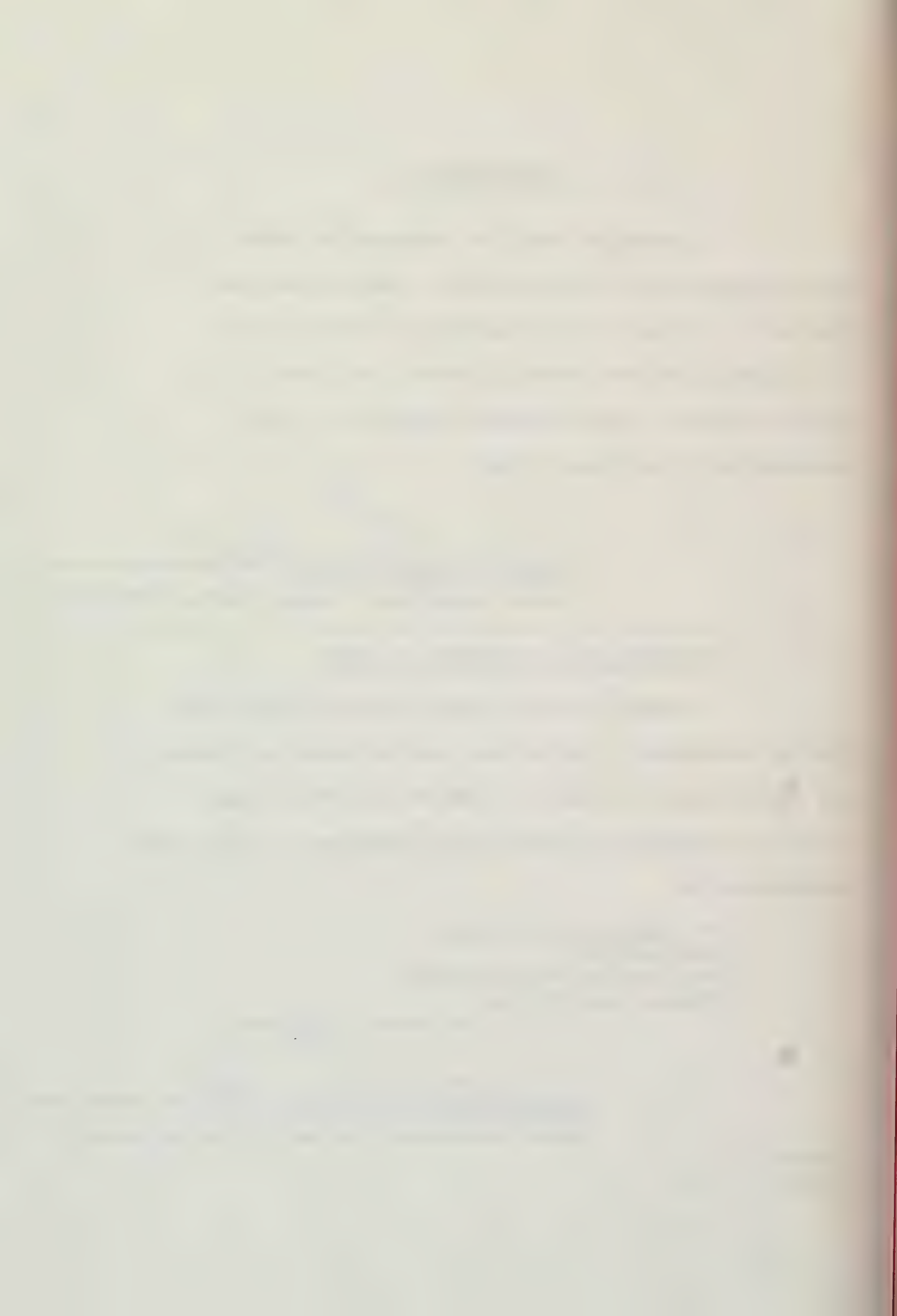
Mr. Ronald J. Arrias
Box A-87988
San Quentin Penitentiary
Tamal, California

In Propria Persona



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Dated:
April 7, 1967



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EWING,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

JOHN A. MITCHELL,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

FILED

MAY 9 1967

WM. B. LUCK, CLERK

MAY 8 1967

NO. 21055

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Attorneys for Appellee,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES EWING,

Appellant,

vs.

UNITED STATES OF AMERICA,

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APPELLEE'S BRIEF

I

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On January 19, 1966, the Federal Grand Jury for the Southern District of California, Southern Division, returned a two-count indictment (36097-SD) charging the appellant James Ewing in Count One with a violation of Title 21, United States Code, Section 174 (conspiracy to smuggle narcotics) and in Count Two with a violation of Title 21, United States Code, Section 176(a) conspiracy to smuggle marihuana [C.T. 2-4] ^{1/}.

A prior indictment numbered 34738-SD ^{2/} naming appellant James Ewing

"C.T." refers to Clerk's Transcript.

The appellant in his designation of record did not include this indictment [C.T. 7, 9] .

and Clarence Currie as defendants had evidently been returned by the Federal Grand Jury. Though the record is not entirely clear, it appears that there were four counts. The appellant Ewing and Currie were charged in Count One with conspiracy to import cocaine; in Counts Two and Three with aiding and abetting the smuggling of cocaine; and in Count Four Currie was charged with failure to register. [R.T. 3-4, 9-10] ^{3/}.

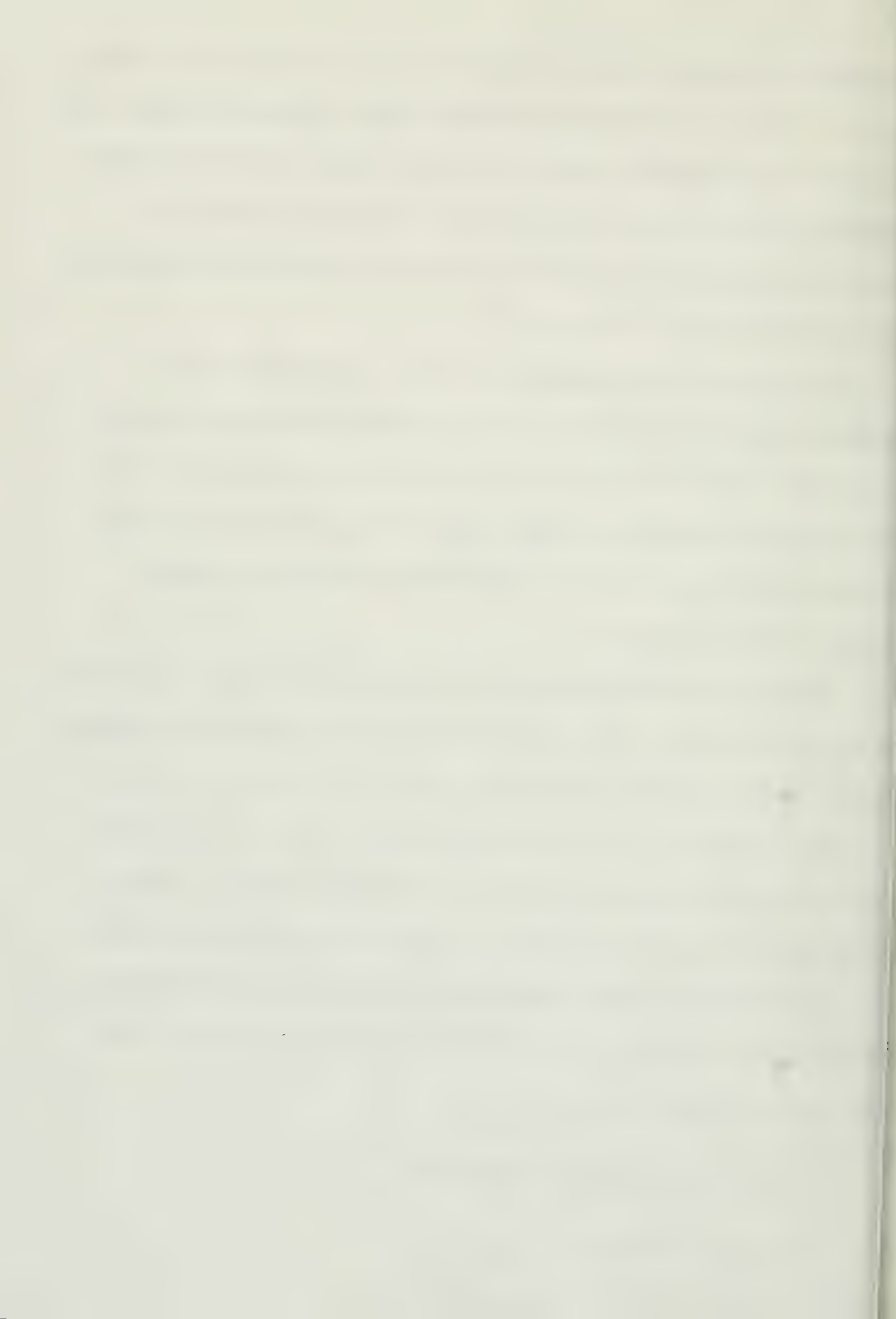
The two cases were consolidated for trial. Count Four of the indictment numbered 34738-SD which charged Currie with failure to register was severed. After three days of jury trial Currie was found guilty by the jury as to Counts One, Two and Three in 34738-SD and the appellant Ewing was found guilty as to Count Two in 36097-SD (conspiracy to smuggle marijuana) [R.T. 29, 349-351].

The appellant was sentenced by the Honorable Fred Kunzel to a 20-year period of incarceration. A timely Notice of Appeal was filed by the appellant. A Motion for New Trial was granted as to Currie [C.T. 5-6; R.T. 361, 367].

The jurisdiction of the United States District Court for the Southern District of California, Southern Division, was based on Title 21, United States Code, Section 176(a) and Title 18, United States Code, Section 3231.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

"R.T." refers to Reporter's Transcript.



II

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) reads in pertinent part as follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000" [Emphasis added] .

III

STATEMENT OF THE CASE

A. Questions Presented.

1. Did the Trial Court commit plain error in joining indictments numbered 34738-SD and 36097-SD for trial?
2. Did the Trial Court commit plain error by informing the jury that the unindicted co-conspirator was deceased?
3. Did the Trial Court commit plain error by allowing the government to prove that the appellant had offered a government witness

money to absent herself from the trial?

4. Did the Trial Court commit plain error by allowing the government to impeach a witness who testified at the trial contrary to a statement he had given a Federal agent?

5. Did the Trial Court commit plain error by allowing a government witness to testify that a cigarette, which had been rolled in her presence and which made her high, was marihuana?

6. Did the government prove that the appellant conspired to smuggle marihuana?

7. Did the Trial Court commit plain error in his comments to the jury?

B. Statement of the Facts.

In 1957 Marilyn Jackson met James Thomas in New Jersey and began living with him in a common-law relationship. In 1958 they moved to California and lived in Los Angeles, along with her minor son [R.T. 49-51,56].

In early 1963 James Thomas was introduced to James Ewing by William Carter at the Thomas residence in Los Angeles. Discussions took place regarding the transportation of marihuana from Tijuana, Mexico, to Los Angeles, California. It was determined that James Thomas would be paid \$200 for each trip he made to Tijuana, Mexico, to pick up marihuana for James Ewing [R.T. 40, 42-44, 51, 53, 57, 68, 85, 88-89, 109] .

As a result of the discussions, James Thomas agreed to drive to Tijuana, Mexico, to pick up marihuana and deliver it to Los Angeles for

James Ewing. Usually James Thomas was accompanied by Marilyn Jackson and her minor son, and occasionally James Ewing rode with them, though he normally met them in Tijuana, Mexico. James Ewing furnished his car to James Thomas and paid him approximately \$200 after each trip was completed [R.T. 54, 55, 58, 69, 71-72, 89, 95-101] .

The normal procedure that was followed was that James Ewing would contact a Mexican after they arrived in Tijuana, Mexico. James Thomas and Marilyn Jackson, along with her son, would drive James Ewing's car and follow James Ewing and the Mexican to a location outside of town. Then potato or gunny sacks containing marihuana would be placed in the trunk of the Ewing vehicle. They would then drive from Tijuana, Mexico, to the Ewing residence in Los Angeles, California [R.T. 58-60, 65-66, 95] .

James Ewing would then take the sacks into his garage. He on one occasion brought two boxes wrapped in brown paper from the garage into his house. Ewing and Thomas weighed the boxes and commented that they did not weigh as much as they thought. Ewing gave James Thomas and Marilyn Jackson some marihuana in a brown paper bag. They then rolled and smoked some marihuana cigarettes and Marilyn Jackson, who was familiar with marihuana, got high. [R.T. 65-69, 89, 96-98] .

Similar trips were made by James Thomas, Marilyn Jackson and her son during 1963 [R.T. 64-65, 71-72, 101-103, 105-107] .

On one occasion in Tijuana, Mexico, James Ewing gave James Thomas some powder in a cellophane package. This was also delivered to the Ewing residence. Ewing told James Thomas that the buyer in Chicago was complaining



this alleged error in this Court. Further, the joinder of the two cases for trial was in no way prejudicial to the appellant.

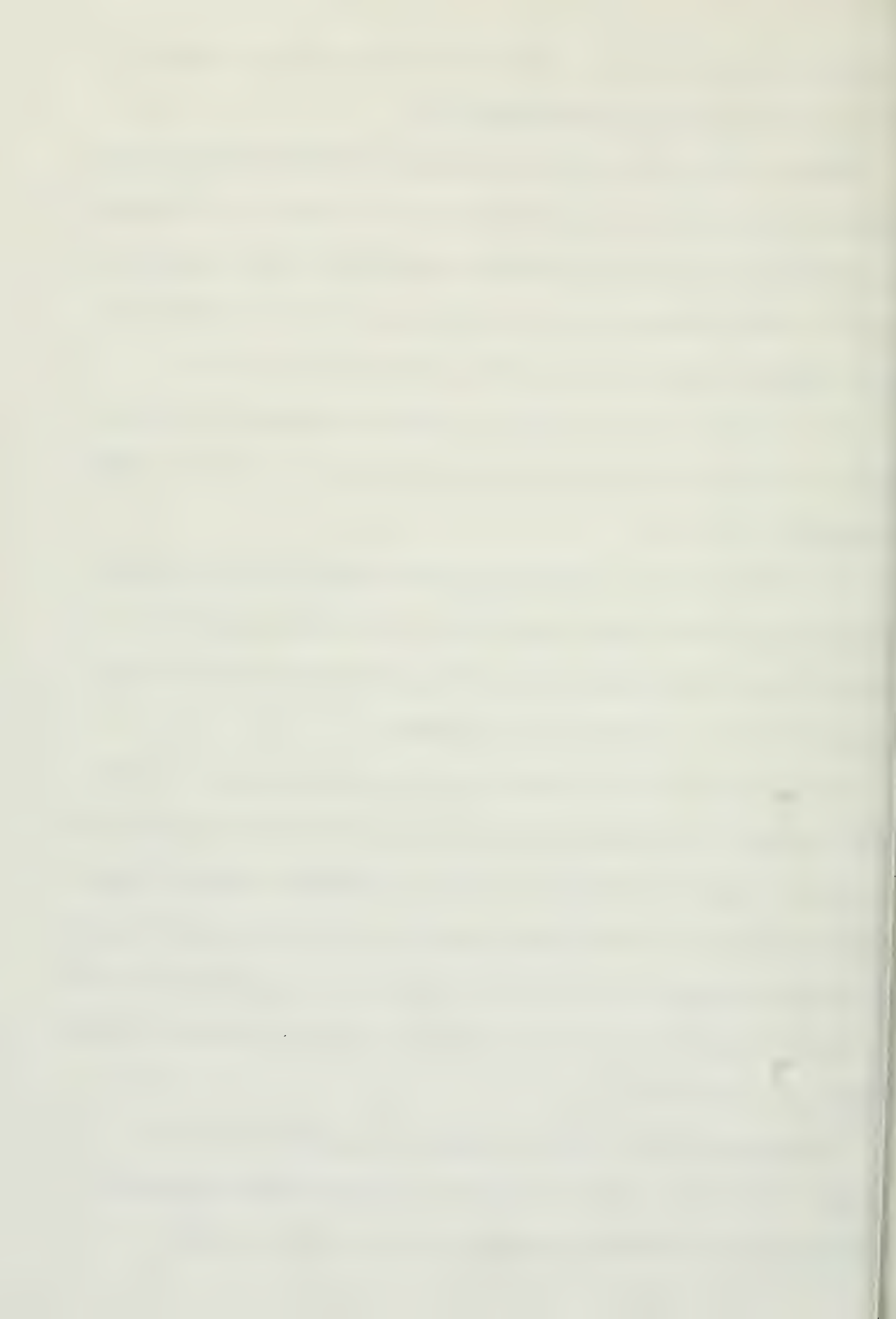
The Trial Court did not commit plain error by informing the jury that the unindicted co-conspirator was now deceased. The reason for the absence of the unindicted co-conspirator could have been shown by the prosecutor in his case-in-chief. However the doctrine of judicial notice allows the Trial Court to inform the jury of the death of the unindicted co-conspirator.

The Trial Court did not commit plain error by allowing the government to prove that the appellant had offered a government witness money to absent herself from the trial.

The Trial Court did not commit plain error by allowing the government to impeach a government witness who testified at the trial contrary to a statement he had given a federal agent. The prosecutor was surprised and was properly allowed to impeach his own witness.

The Trial Court did not commit plain error by allowing a government witness to testify that a cigarette, which had been rolled in her presence and which made her high, was marihuana. The record shows a sufficient factual basis for the conclusion of the witness that the cigarette she smoked, which made her high, was marihuana. Further the testimony concerning the fact that the cigarette was marihuana was merely cumulative of other testimony to which the appellant did not object.

The government proved that the appellant conspired to smuggle marihuana. The first two overt acts alleged were proven by the government. Of course overt acts need not be pleaded in a conspiracy to smuggle



marihuana, and if they are, they are surplusage.

The Trial Court did not commit plain error in his comments to the jury. The comments to the jury were fair and proper and the Trial Court properly instructed the jury concerning the effect of his comments.

V

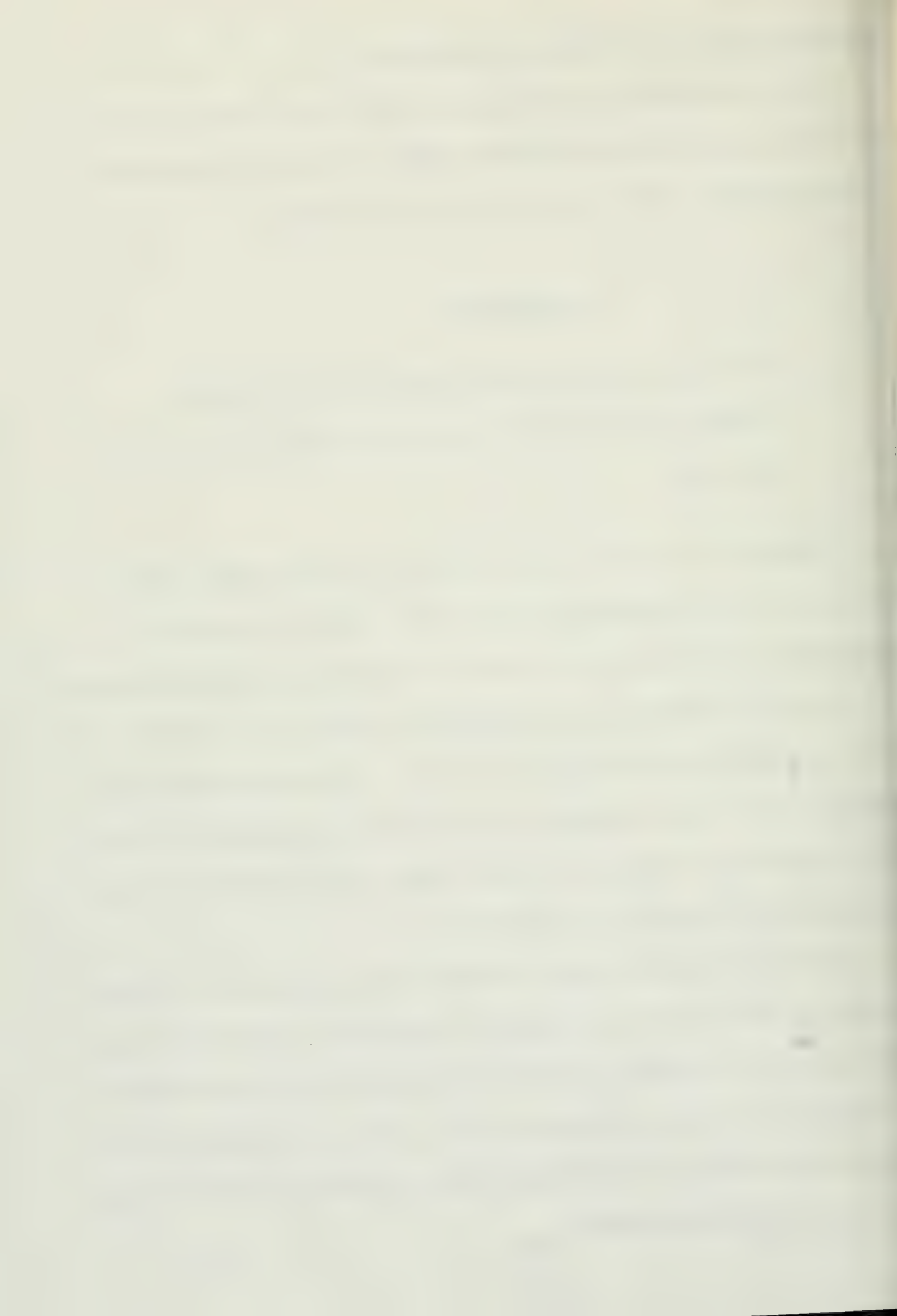
ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN JOINING INDICTMENTS NUMBERED 34738-SD and 36097-SD FOR TRIAL.

Appellant now alleges, for the first time, that the joinder of the two indictments for trial was prejudicial as to him. Appellant has failed procedurally to perfect his record relating to this alleged error on two grounds.

First, the appellant in his designation of record to this Court did not include the indictment in 34738-SD [C.T. 7, 9]. Though there are general statements in the record concerning the Counts in that indictment [R.T. 3-4, 9-10], speculation is required on the part of this Court in determining just who and what was charged in that indictment.

Second, the appellant failed to object to the consolidation of the two indictments for trial on the ground that the consolidation would be prejudicial to him. The objection made by the appellant alleged that the consolidation was prejudicial as to the co-defendant Currie. There was no compliance by the appellant with Rule 51 of the Federal Rules of Criminal Procedure, which reads in pertinent part as follows:



"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the Court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; . . . " (Emphasis added.)

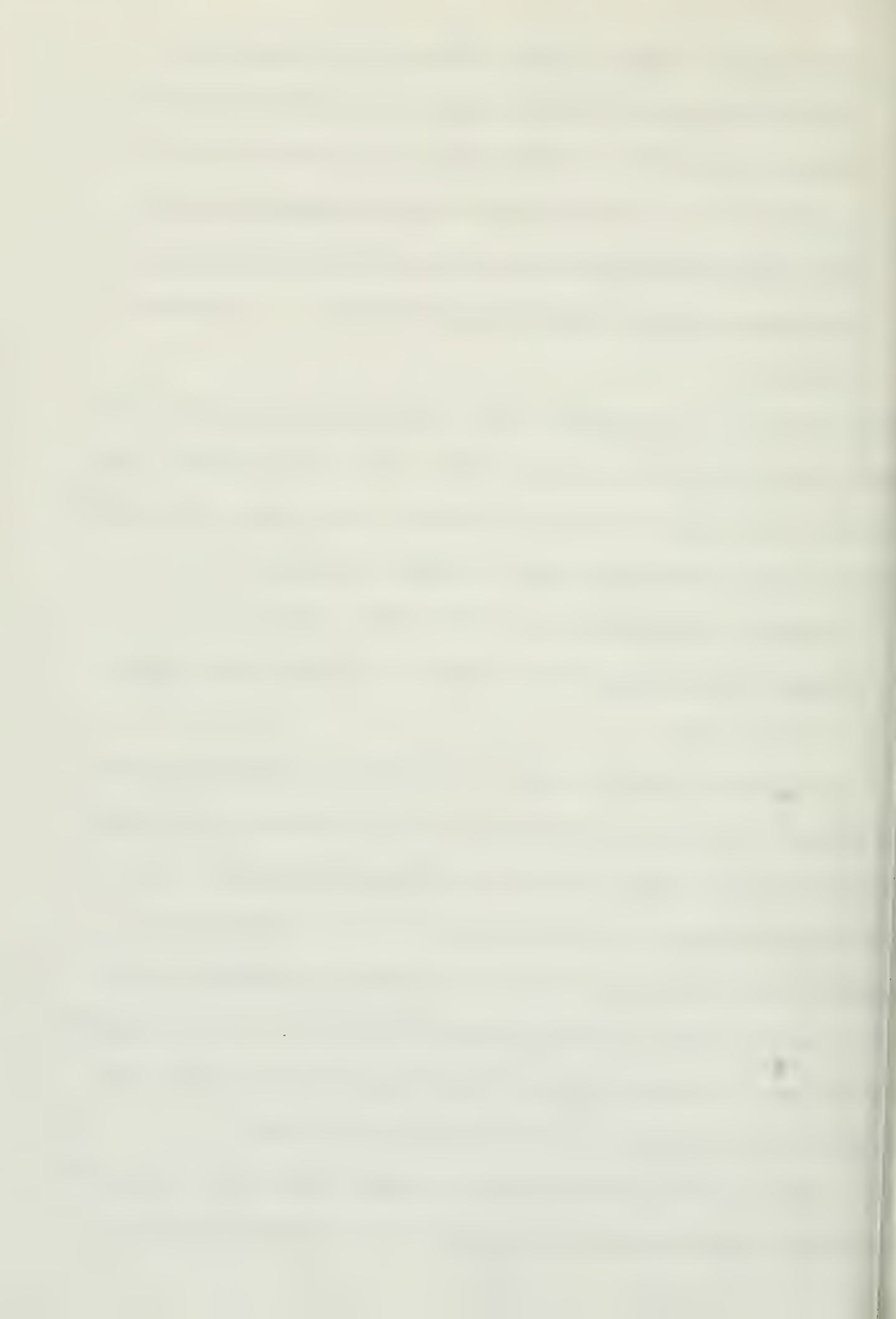
The Government will not speculate on the reasons for appellant's failure to object to the consolidation on his own behalf. This tactical decision, made at the trial level, should not now be considered, unless there is "plain error" within Rule 52(b) of the Federal Rules of Criminal Procedure.

Ramirez v. United States (9 Cir. 1961) 294 F.2d 277;

Fiano v. United States (9 Cir. 1959) 271 F.2d 883, cert. denied 631 U. S. 964.

The record in this case seems to reveal that in 34738-SD appellant was charged in Count One with conspiracy to import cocaine, and in Counts Two and Three with aiding and abetting the smuggling of cocaine. The date of the alleged offenses is not clear from this record. In 36097-SD the appellant was charged in Count One with conspiracy to smuggle narcotics and in Count Two with conspiracy to smuggle marihuana. Thus, the appellant was prosecuted in multiple counts for conspiracy to smuggle cocaine and marihuana and aiding and abetting the smuggling of cocaine.

Apparently the appellant and James Thomas were involved in the entire transaction. However, Mr. Currie, as far as the record shows, was only



involved in the cocaine aspect of the transaction.

If there was any error, it was error for the trial court to allow the case against Currie, who was only involved in the cocaine, to be affected by the testimony relating to the marihuana. Counsel for the appellant obviously agreed with this analysis as his objections appeared to be on behalf of Currie and not his client.

Of course the Trial Court on the day of sentencing resolved the possible prejudicial effect the marihuana testimony may have had as to Currie by granting a Motion for New Trial.

It was noted, in fairness to the prosecutor in this case, that at the trial of this matter he was faced with many problems relating to the proof of the narcotics aspects of the indictment. Mr. Thomas was dead, and Mr. Carter, and Mr. Sutton were recalcitrant witnesses. However, the record is entirely clear, when viewed in the light most favorable to the government, concerning the marihuana aspects of this case.

It is respectfully suggested that the appellant did not procedurally perfect his record concerning the error relating to consolidation. Further, if there was error relating to the consolidation, the error affected Mr. Currie and in no way affected the appellant.

B. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY
INFORMING THE JURY THAT THE UNINDICTED
CO-CONSPIRATOR WAS DECEASED.

Evidently the Trial Court informed the jury that one of the unindicted



co-conspirators was deceased. A Motion for Mistrial was made and denied. The appellant now contends that an innocuous statement to the jury at the beginning of a three day trial was plain error.

It is difficult to understand how the statement referred to could in this case amount to plain error. The trial judge could have taken judicial notice of the fact that one of the unindicted co-conspirators was deceased.

Brown v. Riper (6 Cir. 1964) 331 F.2d 600;

McCormick, Evidence, 710 (1954).

If the Trial Court had not informed the jury of the fact that one of the unindicted co-conspirators was deceased at the time of trial then the government would have been required to prove this fact in order to avoid the obvious defense argument. This proof would of course have been material and relevant.

C. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY
ALLOWING THE GOVERNMENT TO PROVE THAT THE
APPELLANT HAD OFFERED A GOVERNMENT WITNESS
MONEY TO ABSENT HERSELF FROM THE TRIAL.

Marilyn Jackson, the common-law wife of James Thomas, the main government witness in this case, testified in substance, that the appellant offered her money to absent herself from the trial.

In order to prove intent the government is entitled to prove conduct of the appellant subsequent to the crime which amounts to obstruction of justice. It is material and relevant to prove that the appellant offered a government

witness money to absent herself from the trial.

D. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY
ALLOWING THE GOVERNMENT TO IMPEACH A GOVERNMENT
WITNESS WHO TESTIFIED AT THE TRIAL CONTRARY TO A
STATEMENT HE HAD GIVEN A FEDERAL AGENT.

Mr. Jefferson Sutton was called as a government witness. Prior to the trial the witness had been interviewed by a Customs agent. That interview was reduced to writing. Subsequently another interview with the same Customs agent took place and the witness again related information similar to the first interview. Subsequently, another Assistant United States Attorney interviewed the witness and the witness again related information similar to the first interview. Approximately one week before the trial the witness talked briefly to the prosecutor and in response to a query as to whether or not he was going to testify in accord with his original interview with the Customs agent the witness told the prosecutor - "I can't possibly tell you what my position is going to be." The prosecutor was informed prior to calling the witness that in prior interviews the witness had responded in accord with his original interview by the Customs agent [R.T. 218-222, 226-229]. The witness then testified that he had lied to the Customs agent. It should be noted that no specific questions, which could have been highly prejudicial to the appellant, were asked by the Trial Court or the prosecutor concerning what the witness had told the Customs agent when first interviewed [R.T. 208-219, 240-241].

The prosecutor in this case properly claimed surprise, and was properly

allowed to impeach the witness. The prosecutor, who had a tape of the Customs Agent's original interview with the witness could have used the tape recording to impeach the witness.

Debardeleben v. United States (9 Cir. 1962) 307 F.2d 362; and

Bieber v. United States (9 Cir. 1960) 276 F.2d 709.

As far as this alleged error, the record reveals that the treatment of the appellant by the Trial Court and the prosecutor was in keeping with the standards of fundamental fairness set forth in Berger v. United States (1935) 295 U. S. 78.

E. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY
ALLOWING A GOVERNMENT WITNESS TO TESTIFY THAT
A CIGARETTE, WHICH HAD BEEN ROLLED IN HER PRESENCE
AND WHICH MADE HER HIGH, WAS MARIHUANA.

The appellant, James Thomas and Marilyn Jackson during 1963 discussed smuggling of marihuana from Mexico to Los Angeles. The appellant paid James Thomas to smuggle marihuana from Tijuana, Mexico, to Los Angeles. The appellant either rode with James Thomas and Marilyn Jackson to Tijuana or met them in Tijuana.

On at least one occasion potato or gunny sacks were loaded into a vehicle which James Thomas drove from Tijuana to the appellant's residence in Los Angeles. The sacks were taken into a garage at the appellant's residence and the appellant came out of the garage with two boxes wrapped in brown paper. The boxes were weighed in the appellant's residence. The appellant

then broke open one of the boxes and put some in a bag. James Thomas, while at the appellant's residence rolled a couple of cigarettes and he and Marilyn Jackson each smoked one of the cigarettes. The cigarette made Marilyn Jackson high.

At the trial Marilyn Jackson testified that the material she smoked made her high. She further testified that the material she smoked was "reefers." In response to a question from the trial court Marilyn Jackson said the material was marihuana [R.T. 68-70] .

The appellant now contends that the Trial Court committed plain error in allowing Marilyn Jackson to testify that the cigarette she was smoking was a marihuana cigarette.

The record shows that there was no objection made by the appellant to the testimony of Marilyn Jackson regarding the fact that the cigarette made her high and was a reefer [R.T. 69] .

Thus the only question for this Court's consideration is whether or not the Trial Court's question as to whether or not the cigarette was marihuana was plain error within Rule 52 of the Federal Rules of Criminal Procedure .

Under a strict application of the so-called "opinion rule" , the expressions of opinion or conclusions by a lay witness are generally not admissible into evidence. The strict interpretation allows the lay witness to testify only as to facts.

However, the trial judge is generally permitted, in his discretion, to allow opinions or conclusions of lay witnesses based on personal observation.

United States v. Trenton Potteries (1927) 273 U. S. 392;

Zinberg v. United States (1 Cir. 1944) 142 F.2d 132;

United States v. Petrowe (2 Cir. 1950) 185 F.2d 334.

It is obvious here that Marilyn Jackson was involved, along with her common-law husband, and the appellant, in a conspiracy to smuggle marihuana; that Marilyn Jackson knew that marihuana was being smuggled from Tijuana to Los Angeles; that on at least one occasion the appellant after placing the potato or gunny sacks in his garage took two boxes from the garage wrapped in brown paper; that Marilyn Jackson and James Thomas received a bag of material from the two boxes and some of the material was rolled into cigarettes; and that the cigarette Marilyn Jackson smoked made her high.

It is respectfully submitted that the opinion or conclusion by Marilyn Jackson that the substance she smoked was marihuana was proper in that it was based upon her personal observations and experience.

Notwithstanding the foregoing analysis this record indicates that the appellant failed to object when Marilyn Jackson testified that the cigarette she smoked made her high and was a "reefer." [R.T. 69]. Under Rule 51 of the Federal Rules of Criminal Procedure and Rule 18 of this Court the appellant has waived any error as to the testimony of Marilyn Jackson that she smoked a cigarette which was a "reefer" and which made her high.

Of course "reefers" and marihuana are one and the same and if the testimony concerning the fact the cigarette was marihuana was improper it was merely cumulative and harmless error.



Gordon v. United States (6 Cir. 1948) 164 F.2d 855.

F. THE GOVERNMENT PROVED THAT THE APPELLANT
CONSPIRED TO SMUGGLE MARIHUANA.

The appellant contends that the government did not prove the conspiracy to smuggle marihuana in that no overt act was proved.

Overt act number one alleges that on or about March 15, 1963, James Thomas brought marihuana into the United States. According to Marilyn Jackson several trips were made to Tijuana, Mexico, by James Thomas and herself to pick up marihuana for the appellant during 1963. One of the trips was made in the early summer and several weeks after January 15, 1963, the date of the death of her father. [R.T. 62-64, 86, 100] .

When the evidence concerning the first overt act charged is viewed in the light most favorable to the government, as it must be under Glasser v. United States (1942) 315 U. S. 60, the evidence shows that James Thomas brought marihuana into the United States on a date reasonably near the date alleged.

Ledbetter v. United States (1898) 170 U. S. 606.

The second overt act alleges that Jefferson Sutton left the United States on or about December 29, 1963 to meet the appellant in Tijuana, Mexico. The evidence shows that in the latter part of the summer of 1963, after Marilyn Jackson and James Thomas had made six or seven trips to Tijuana, Mexico, Jefferson Sutton and Marilyn Jackson went to Tijuana and met with the appellant. Sutton was going to take James Thomas's place, and Marilyn

Jackson was going to show him where to go. [R.T. 65, 75-77] .

When viewed in the light most favorable to the government it is respectfully suggested that this record shows the government proved the second overt act.

Even though the government proved the overt acts previously referred to, it is clear that in a charge of conspiracy to smuggle marihuana overt acts need not be pleaded and when overt acts are pleaded they are surplusage.

Leyvas v. United States (9 Cir. 1967) 371 F.2d 714.

G. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN
HIS COMMENTS TO THE JURY.

The trial judge pointed out to the jury certain evidence in the case. However, the trial judge made clear to the jury that any comments made by him could be completely disregarded by the jury in making their determination. [R.T. 340-342] .

It is clear that the Trial Court may comment on the evidence in a case.

Murdock v. United States (1933) 290 U.S. 389;

Henry v. United States (9 Cir. 1951) 186 F.2d 521.

The Trial Court here commented fairly on the evidence and properly instructed the jury concerning the effect of his comments on their decision.

CONCLUSION

The Government respectfully submits that the appellant's conviction should be affirmed.

Respectfully submitted,

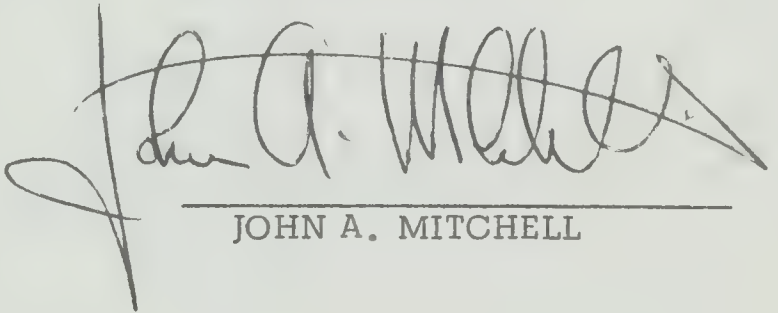
EDWIN L. MILLER, JR.,
United States Attorney,

JOHN A. MITCHELL,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOHN A. MITCHELL



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No. 21057 ✓

JAMES HENRY,
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Appellee.

No. 21058 /

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APPEAL FROM
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CENTRAL DIVISION

FILED

JUL 21 1966

WM. B. LUCK, CLERK

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Chief Assistant U. S. Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
RONALD S. MORROW,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NOV 4 1966

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Chief Assistant U. S. Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
RONALD S. MORROW,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES GRANT,)	
)	
Appellant,)	
vs.)	No. 21057
)	
UNITED STATES OF AMERICA,)	
)	
Appellee.)	
)	

JAMES HENRY,)	
)	
Appellant,)	
vs.)	No. 21058
)	
UNITED STATES OF AMERICA,)	
)	
Appellee.)	
)	

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

The appellants were indicted in one indictment, by the Federal Grand Jury for the Southern District of California, Central Division, for violations of Title 18, United States Code, Sections 371 - Conspiracy, 2313 - Receiving Stolen Motor Vehicle in Interstate Commerce, and 2 - Aiding and Abetting [C. T. 2]. ^{1/}

^{1/} C. T. refers to Clerk's Transcript.

Following a court trial before the Honorable Thurmond Clarke, United States District Judge, from March 9, 1965 to March 26, 1965, in the District Court for the Southern District of California, Central Division, appellant Charles Grant was found guilty of Counts One, Two, Five, Six and Seven, and appellant James Henry was found guilty of Counts One, Two and Four. Appellant Grant was convicted and sentenced on April 27, 1965, to five three-year terms of imprisonment, the five terms to run concurrently [C. T. 36]. Appellant Henry was convicted and sentenced on May 25, 1965, to three three-year terms of imprisonment, the three terms to run concurrently [C. T. 40]. The remainder of the defendants, Henry Campbell, Harry Joe Tucker, Roosevelt Wooten and James Chester Taylor were convicted and have not appealed.

Appellant Grant filed, on April 29, 1965, a Notice of Appeal from the Judgment [C. T. 41]. Appellant Henry filed on May 25, 1965, a Notice of Appeal from the Judgment [C. T. 44].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 371, 2, 2312, 2313 and 3231.

This Court has jurisdiction to review the judgments of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

QUESTIONS PRESENTED

1. Whether the evidence presented was sufficient to sustain a conviction of appellant Grant.
2. Whether the appellant Grant was denied adequate representation of counsel under the Sixth Amendment of the Constitution.
3. Whether the evidence presented was sufficient to sustain a conviction of appellant Henry.

III

STATEMENT OF FACTS

Briefly, Henry Campbell, a resident of St. Louis, Missouri, stole automobiles in St. Louis and either transported, or caused to be transported, said automobiles to Roosevelt Wooten in Los Angeles, California. Before the operation was set up, Wooten agreed with the two appellants that the appellants would pay for the automobiles once they arrived in Los Angeles. Four specific Cadillacs are involved in the case. The stolen character of the Cadillacs is conceded in the opening briefs of both appellants [Grant's Opening Brief, p. 5, lines 1-3; and Henry's Opening Brief, p. 5, lines 1-3]. It is further conceded that two stolen Cadillacs were in the possession of appellant Henry at the time of his arrest [Henry's Opening Brief, p. 5, lines 3-7].

The gist of the defense was that no agreements were made and there was no knowledge by appellants Grant and Henry that the automobiles were stolen.

TESTIMONY OF ROOSEVELT WOOTEN:

In the fall of 1962 indicted co-conspirator Roosevelt Wooten met with indicted co-conspirators Harry Joe Tucker and Charles Grant at Grant's garage in Los Angeles [R. T. 142], ^{2/} and discussed getting stolen automobiles from "back east", and selling said automobiles in California [R. T. 143-144]. Grant initiated the conversation about stolen vehicles [R. T. 144]. Wooten explained to Tucker and Grant that he knew a fellow in St. Louis who would probably help them [R. T. 144-145]. One or two days later Wooten met Grant at Grant's garage and they proceeded to appellant James Henry's used car lot [R. T. 145-146]. Grant introduced Wooten to Henry and told Henry that Wooten was the man they "needed to help get cars from back east" [R. T. 145, 146]. The three discussed that Wooten would have to go back to St. Louis and talk with his acquaintance (indicted co-conspirator Henry Campbell) [R. T. 149]. Several days later Wooten returned to Henry's used car lot and discussed the prices to be paid by Henry for the stolen automobiles: \$1,400 for a 1962 Cadillac, \$1,600 for a 1963 Cadillac, and \$1,800 for a convertible [R. T. 149-150].

^{2/} R. T. refers to Reporter's Transcript.

Henry suggested that Wooten fly back to St. Louis to discuss the matter with his "man" and, after giving Wooten \$300, Wooten went to St. Louis and told indicted co-conspirator Henry Campbell that "some people out here" could sell stolen automobiles [R. T. 151-152]. Campbell agreed to provide the stolen Cadillacs and told Wooten the method by which he, Campbell, would inform Wooten when an automobile was enroute [R. T. 153]. The meeting with Campbell took place at the end of September, 1962, or the beginning of October [R. T. 153]. After the amount to be received for the various automobiles was discussed [R. T. 152], Wooten returned to Los Angeles and reported to Henry that the vehicles would be arriving soon [R. T. 153].

Shortly after returning Wooten received a phone call from Campbell saying a Cadillac was on its way [R. T. 154]. A man by the name of James Harris delivered a 1962 White Cadillac with Missouri license plates to Wooten (the automobile referred to in Count Two of the Indictment), and Wooten then took it to Grant's garage [R. T. 154-155]. Grant then took the 1962 white Cadillac to Henry's [R. T. 162]. In November 1962, when Henry received the automobile, Henry told Wooten there would be more money for Wooten if the cars were registered [R. T. 163]. Henry advised Wooten on how to alter documents for the purpose of obtaining a proper registration of the automobile [R. T. 166-167].

On March 1, 1963, Wooten went to the California Department of Motor Vehicles with Charles Shafer for the purpose of registering the 1962 white Cadillac [R. T. 167-168, Ex. 5C]. The



document Ex. 5C, was prepared in the office of Henry by Henry's staff [R. T. 212]. While registration was obtained a "pink slip" was not [R. T. 168-169]. Wooten paid for the registration with a check that "bounced" and later Henry paid the amount with a money order [R. T. 169; appellant Henry, R. T. 713]. The 1962 white Cadillac stayed with appellant Henry until the time of his arrest [Testimony of Henry, R. T. 696]. After the registration of the 1962 white vehicle, Henry gave Wooten \$600, half of which was sent to Campbell in St. Louis [R. T. 171]. Henry stated at one time to Wooten that Tucker did a bad job of changing the numbers on the white 1962 Cadillac [R. T. 235].

In June of 1963, Henry told Wooten he wanted another Cadillac [R. T. 172-173]. Wooten called Campbell and in a few days a 1963 blue Cadillac [the automobile referred to in Counts Three and Four of the Indictment] was delivered to Wooten by Campbell personally [R. T. 172-174]. The blue Cadillac was delivered to Henry by Wooten and Henry paid \$400 to Wooten [R. T. 174].

At one time Henry told Wooten that co-conspirator Tucker was changing the numbers on the cars brought out by Wooten [R. T. 175-176].

In November of 1963 a red 1963 Cadillac convertible (the automobile referred to in Counts Six and Seven) was brought to California by James Perry, and was given to appellant Grant by Wooten [R. T. 176-178]. At the time, Grant expressed displeasure with the fact that the aforementioned blue Cadillac had been taken

to Henry, instead of himself [R. T. 177]. The red convertible stayed at Grant's for a few days and then Tucker told Wooten that it was in his (Tucker's) garage [R. T. 179]. Wooten went to Tucker's garage and saw the 1963 red convertible in the garage [R. T. 288]. While looking at the red convertible in Tucker's garage, Grant arrived and told Wooten that there was a customer for the car and the reason the car was in Tucker's garage was because there was a policeman having some work done at Grant's garage [R. T. 288-289].

TESTIMONY OF NATHAN BUTLER:

From September of 1963 and into 1964 Butler had several discussions with appellant Grant and defendant Tucker about stolen Cadillacs [R. T. 64-65, 74]. During the course of the discussions Tucker stated that his 1959 Dodge was also a stolen car and had had its numbers changed [R. T. 12]. Tucker first offered Butler a 1963 blue Cadillac [R. T. 64].

Both Grant and Tucker told Butler the cars being offered for sale were being stolen back east and brought to California [R. T. 60].

Tucker told Butler that changing the numbers on automobiles was "his (Tucker's) end of the bargain" [R. T. 61], and " . . . Charles (Grant) was supposed to be the big wheel, he was supposed to get the money, and Charles give these guys the car to sell" [R. T. 62].

Following the offer of the 1963 blue Cadillac, Tucker came

to Butler and told him Grant had a red 1963 Cadillac convertible that could be purchased for \$2,000 [R. T. 55-59, 64]. Butler was told by Grant that the convertible he wanted would be \$2,000 [R. T. 111, 114]. At the time of the offer of the red Cadillac the car was in Tucker's garage and Tucker said he had done the "paper work" on it [R. T. 104-107]. The car had been obtained from Grant [R. T. 91-92].

When Butler developed difficulty in paying for the car Tucker said "some guys back east was going to kill me because they had the car all set up to be delivered" [R. T. 59]. When Butler told Tucker he wouldn't take the red Cadillac because Grant and Tucker couldn't give him clear title, Tucker offered a white 1963 Cadillac to him [R. T. 60].

TESTIMONY OF ROBERT MASO GRIFFIN:

In the summer of 1963, Griffin sold a 1963 white Cadillac convertible without license plates to Tucker [R. T. 361]. The automobile was stolen in St. Louis, Missouri [R. T. 362], and is the car referred to in Count Five. Grant told Griffin before the sale, that Tucker would buy the car. Prior to the sale to Tucker, Grant had the car at his garage [R. T. 362-363]. Griffin told Tucker the car was stolen [R. T. 363].

During July of 1963 Tucker told Griffin that he (Tucker) had to alternate the numbers on some cars for appellant Henry [R. T. 364-365]. Griffin also testified that he had seen the aforementioned red and white Cadillacs at Henry's lot and Grant's

garage. In February of 1963, the 1962 white Cadillac was seen at Henry's lot [R. T. 368], and the red 1963 convertible was seen at Grant's garage in November of 1963 [R. T. 369].

TESTIMONY OF CARL RUNDQUIST OF THE MISSOURI
DEPARTMENT OF MOTOR VEHICLES:

The documents in the possession of the California Department of Motor Vehicles purportedly showing Missouri registration for the subject 1962 white Cadillac and 1963 red convertible were fraudulent [R. T. 444-449].

TESTIMONY OF RICHARD NEWSOME OF THE
NATIONAL AUTOMOBILE THEFT BUREAU:

The subject 1962 white Cadillac ^{3/} found in the possession of appellant Henry had a true Vehicle Identification Number ^{4/} of 62G009070 and a false VIN of 62J151783 [R. T. 544]. The subject 1963 blue Cadillac ^{5/} found in the possession of appellant Henry had a true VIN of 63J114463 and a false VIN of 63J023726 [R. T. 545].

^{3/} The vehicle of Count Two.

^{4/} Hereinafter referred to as VIN.

^{5/} The vehicle of Counts Three and Four.

TESTIMONY OF EDWARD H. FISHER OF THE
NATIONAL AUTOMOBILE THEFT BUREAU:

The subject 1963 white Cadillac convertible 6/ found in the possession of defendant Tucker had a true VIN of 63F104884 and a false VIN of 63F061724 [R. T. 550].

TESTIMONY OF ROBERT M. ZIMMERS OF THE
FEDERAL BUREAU OF INVESTIGATION:

The false VIN's on the subject 1962 white, 1963 white, and 1963 blue Cadillacs were all made by the same set of dies [R. T. 525].

TESTIMONY OF SERGEANT VOSS OF THE LOS
ANGELES POLICE DEPARTMENT:

The subject 1963 white Cadillac was in Tucker's possession when he was arrested [R. T. 529]. Tucker stated he bought the car from Maso (Robert Maso Griffin) [R. T. 533], which, incidentally, coincides with the testimony of Griffin at R. T. 361-362.

TESTIMONY OF SPECIAL AGENT LESTER M. LED-
BETTER OF THE FEDERAL BUREAU OF INVESTIGATION:

Tucker said, when interviewed by the FBI, that he had purchased the set of dies and used them to place the false VIN on the 1963 white Cadillac [R. T. 558]. The car was purchased from

6/ The vehicle of Count Five.

Griffin, whom Tucker had met through appellant Grant [R. T. 556].

In November of 1964, Ledbetter interviewed appellant Henry and Henry stated he bought the aforesaid 1962 white Cadillac from Wooten [R. T. 573-574].

TESTIMONY OF JAMES HENRY:

Appellant Henry admitted on the stand that the price of the 1962 white Cadillac was not consistent with its value [R. T. 671]. Henry admitted he knew that a false address was used in the registration of the 1962 white Cadillac at the time he obtained it [R. T. 683].

The subject blue 1963 Cadillac was brought to Henry by Wooten [R. T. 687]. When Henry obtained the blue Cadillac, Wooten stated, "Here's an automobile that you will be able to buy right. Right now it is not ready for sale . . ." [R. T. 687]. When the car was brought in it had no license plates on it [R. T. 705]. Henry never paid for the car [R. T. 756]. When the blue 1963 Cadillac was brought to him it had no registration and he never registered it [R. T. 757-758].

Appellant Henry had the 1962 white Cadillac in his possession for approximately a year and one-half and never had a California "pink slip" for it [R. T. 696]. When he acquired said vehicle from Wooten he knew it wasn't transferable [R. T. 748].

TESTIMONY OF DEFENDANT TUCKER:

Tucker's testimony corroborated the testimony of Griffin

by stating that Grant introduced him to Griffin at Grant's garage in July of 1963 [R. T. 782].

TESTIMONY OF ELNA LOMBARD:

On May 8, 1963, Dr. Lombard had her 1963 white Cadillac convertible, true VIN 63F104884 (Exhibit 3), stolen in St. Louis, Missouri [R. T. 17-23]. 7/

TESTIMONY OF LEONARD EVANS:

On June 1, 1963, Mr. Evans had his 1963 blue Cadillac, true VIN 63J114463 (Exhibit 1), stolen from in front of his house in St. Louis, Missouri [R. T. 24-26]. 8/

TESTIMONY OF JAY REEG:

On October 11, 1962, a white 1962 Cadillac, true VIN 52G009070 (Exhibit 2) was stolen from the car lot where Mr. Reeg is the office manager in St. Louis [R. T. 29-38]. 9/

TESTIMONY OF JUANITA McKEE AND ORVILLE HENTZ:

Just before Thanksgiving of 1963 a 1963 red Cadillac convertible true VIN 63F02549 (Exhibit 4) was stolen from Mr. Hentz's

7/ The vehicle of Count Five.

8/ The vehicle of Counts Three and Four.

9/ The vehicle of Count Two.

car lot in St. Louis after it had been placed there for sale by Mrs. McKee [R. T. 38-48]. 10/

SUMMARY OF SUBSTANTIVE EVIDENCE

A brief summary of the evidence as to the substantive counts is as follows:

The vehicle of Count Two was stolen from the lot of Mr. Reeg on October 11, 1962; brought to Wooten in November of 1962; delivered to appellant Grant; taken to appellant Henry a few days later, who kept it in his possession until the time of his arrest after it had had its VIN changed by defendant Tucker.

The vehicle of Counts Three and Four was stolen from Mr. Evans on June 1, 1963; driven to California by defendant Campbell in July of 1963; delivered to appellant Henry in July of 1963, and remained in his possession until his arrest without being registered or paid for; and had its VIN changed by defendant Tucker.

The vehicle of Count Five was stolen in St. Louis from Dr. Lombard on May 8, 1963; brought to California and sold to defendant Tucker by Griffin after Griffin had been introduced to Tucker by appellant Grant; and the vehicle had had its VIN changed by Tucker with the same set of dies used to change the VIN on the vehicles of Counts Two, Three and Four.

The vehicle of Counts Six and Seven was stolen from the

10/ The vehicle of Counts Six and Seven.

lot of Mr. Hentz just before Thanksgiving of 1963; brought to California in November of the same year and delivered to Wooten; it was then delivered to appellant Grant and subsequently concealed in the garage of defendant Tucker; then Bill Grant sold it to Charles Taylor.

IV

SUMMARY OF THE ARGUMENT

The gist of the appellants' appeals is that Roosevelt Wooten's testimony was uncorroborated and Wooten was impeached. As the Court may observe from the above statement of facts, the testimony of Wooten is corroborated. Legally, the testimony of an accomplice need not be corroborated. The credibility of a witness is for the trier of fact, and in this case Judge Clarke came to the right findings of fact.

Appellant Grant argues that his counsel, Mr. Robert Schneider, did not have adequate time to prepare a defense. Aside from the fact that the trial took over two and one-half weeks to complete, Mr. Schneider stated to the Court that the defense was "adequately presented" [R. T. 1033].

ARGUMENT

- A. EVEN THOUGH THE TESTIMONY OF AN ACCOMPLICE NEED NOT BE CORROBORATED, SUCH CORROBORATION EXISTS IN THIS CASE.
-

A conviction of conspiracy, or a substantive crime, may rest on the uncorroborated testimony of accomplices.

Westenrider v. United States, 134 F.2d 772

(9th Cir. 1943), relying on Caminetti v.

United States, 242 U.S. 470 (1917).

It is not for an appellate court to weigh the evidence or to determine the credibility of witnesses. A verdict of conviction must be sustained if, taking the view most favorable to the Government, there is substantial evidence to support it.

Glasser v. United States, 315 U.S. 60, 80 (1942);

Nye & Nissen v. United States, 168 F.2d 846

(9th Cir. 1948), aff'd. 336 U.S. 613 (1949).

The complaint that a man is convicted by accomplices and unsavory characters is answered by the fact that the credibility of a witness is a question for the trier of fact.

Glasser, supra, at 77.

The appellee concedes that Roosevelt Wooten was impeached in connection with two collateral matters - a 1963 metallic green Eldorado Cadillac and a trip to St. Louis in 1963. Wooten initially stated he knew nothing about said Cadillac and was not in St. Louis

in 1963. At page 1031 of the Reporter's Transcript Wooten stated his earlier testimony with respect to the trip and car was not the truth. However, at page 1038 Wooten explained that a man came to him and told him that if his name was mentioned in connection with said 1963 Eldorado involved in the trip back from St. Louis, then he (Wooten) would be killed. The fact that Wooten was indeed threatened is born out by the testimony of Special Agent Gerald Moore, of the FBI, at page 1101 of the Reporter's Transcript.

The convictions on the several counts are also supported by the fact that Henry and Grant were in possession of the stolen vehicles shortly after the subject thefts. The presumption arising from possession of recently stolen property would support the convictions arising out of the substantive counts.

It is submitted that the testimony of the witnesses other than that of Wooten, combined with the documents admitted into evidence, would support a conviction of the appellants on each and every count.

**B. THERE WAS SUFFICIENT TIME FOR
COUNSEL FOR APPELLANT GRANT
TO PREPARE AN ADEQUATE DEFENSE.**

The arraignment of defendant Grant took place on March 8, 1965 [R. T. Vol. A]. At the arraignment of Grant, his attorney was offered an opportunity to see all documentary evidence and to discuss the testimony of the witnesses against Grant with the prosecutor [R. T. 9a].

The facts do not support the allegation that counsel for Grant could not prepare "an adequate defense". The trial lasted over two and one-half weeks. It was not until March 17, 1965, that the defendants started their defense by calling witnesses to the stand. On March 16, 1965, defendant Henry put on one witness out of order. In the time between March 8 and March 17 there was adequate time to prepare a defense inasmuch as the issues were not complex.

It is to be observed that counsel for Grant has had a change of opinion since the time the trial took place over one year ago. At that time, March 23, 1965, Mr. Schneider, who is also counsel for Grant on this appeal, stated that the defense had been "adequately presented" [R. T. 1033].

It is noted that counsel for Grant thoroughly cross-examined all government witnesses, called several witnesses for Grant and, generally, ably represented Grant. At no point in Grant's Opening Brief is there demonstrated how counsel for Grant might have been hampered.

VI

CONCLUSION

The record, as demonstrated by the above statement of facts, supports the convictions herein. Not only was Roosevelt Wooten's testimony corroborated, but the appellants could have been convicted without such testimony. The dates of possession



admitted by the defendants, the dies, the trips, the stolen nature of the automobiles, the fact the vehicles were all stolen in St. Louis, the modus operandi of similar fraudulent registrations, and the inconsistent statements of the defendants all support the convictions. The agreement to transport the stolen vehicles can be inferred from the testimony and documentary evidence without looking to Wooten's testimony.

The claim that counsel for Grant was not afforded adequate time to prepare a defense is not supported by the facts.

The judgments below should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Chief Assistant U. S. Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

RONALD S. MORROW,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW

NO. 21,060 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WING WA LEE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

RESPONDENT'S BRIEF

CECIL F. POOLE
United States Attorney

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102

Attorneys for Respondent

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SAN FRANCISCO



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NO. 21,060

WING WA LEE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

RESPONDENT'S BRIEF

JURISDICTION

The petitioner is a native and citizen of the Republic of China, about 38 years of age. He last entered the United States at Los Angeles, California, on or about September 30, 1962 as a nonimmigrant crewman authorized to remain in the United States in such status for the period of time his vessel remained in port, in no event to exceed 29 days. He failed to depart with his ship, and remained in the United States beyond

the period authorized. Deportation proceedings were instituted against him on April 5, 1963. Deportability on the charge states was conceded, and he was found deportable under Section 241 (a)(2) of the Immigration and Nationality Act, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, he remained in the United States for a longer period of time than permitted. He was ordered deported to the Republic of China (in Formosa) or in the alternative to Macao.

No appeal was taken, and the order became final. Respondent was unable to effect deportation to either place, and therefore moved to reopen the proceedings for an order for his deportation to Hong Kong. The motion was granted, and on May 19, 1965, the Special Inquiry Officer ordered deportation of petitioner to Hong Kong. An appeal to the Board of Immigration Appeals was dismissed on July 29, 1965.

On October 3, 1965, Congress amended the Immigration and Nationality Act by Public Law 89-236, particularly Section 203(a)(7) (8 USC 1153(a)(7)). Petitioner attempted to file an application under Section 203(a)(7), and moved the Board of Immigration Appeals to reopen the proceeding. The motion was denied by the Board of Immigration Appeals on the ground that petitioner was ineligible.

Petitioner invokes the jurisdiction of this Court under Section 106(a) of the Immigration and Nationality Act (8 USC 1105(a)). He does not contest the original deportation order, but challenges only the denial of his motion to reopen the deportation proceedings.

Respondent concedes jurisdiction under Section 106(a). Although the petition for review was filed more than six months after the original deportation order, it was timely with respect to the Order of the Board of Immigration Appeals of June 1, 1966.

Bregman v. INS, 9 Cir.
351 F.2d 401

The attention of the Court is called to the case of Tai Mui v. Esperdy in the Court of Appeals for the Second Circuit (Docket No. 30621, Calendar No. 133). On an identical factual situation the case reached the Court of Appeals via a summary judgment in a declaratory judgment action in the District Court. The appellant had sought and was denied a stay of deportation from the District Director, in order to prosecute an application for adjustment of status under Section 203(a)(7) of the ground that as a crewman he was ineligible.

Several other cases of aliens seeking the same relief are pending in the Second Circuit, on petitions to review under Section 106(a).^{1/}

^{1/} Woo Cheng Hwa v. INS, Docket 30522, Calendar 154	
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Cheung Hong Sing v. INS, Docket 30637) decision
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STATUTES

Immigration and Nationality Act, as amended
Section 106, 8 USC (1964 Ed.) 1105(a)):

(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended * * *, shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against liens within the United States pursuant to administrative proceedings under section 242(b) of this Act * * * except that--

(1) A petition for review may be filed not later than six months from the date of the final order of deportation * * *;

(9) Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

Section 203(a), 8 USC (1964 Ed. Supp. I) (1153(a)):

(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (a) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals

of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Section 245, 8 USC (1964 Ed.) §1255:

(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved. * * *

REGULATIONS

Title 8 Code of Federal Regulations (Rev.
January 1, 1966):

§245.1 Eligibility

(a) General. An alien who on arrival in the United States was serving in any capacity on board a vessel or aircraft, or was destined to join a vessel or aircraft in the United States to serve in any capacity thereon, or was not admitted or paroled following inspection by an immigration officer is not eligible for the benefits of section 245 of the Act.

(d) Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).

* * * An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act and as provided in §245.4, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. (31 F.R. 535, January 30, 1966.)

§245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.

The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of

the act shall enclose and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination. * (31 F.R. 536, January 15, 1966.)

QUESTION PRESENTED

Is petitioner eligible for relief under Section 203(a)(7) of the Act?

ARGUMENT

Respondent presents the same argument to this Court as has been presented to the Second Circuit in the mentioned cases, particularly Tai Mui v. Esperdy and Woo Chung Wa v. INS.

The Board of Immigration Appeals properly denied petitioner's motion to afford him an opportunity to apply for adjustment of status under Section 203(a)(7) of the Immigration and Nationality Act for which petitioner was statutorily ineligible.

This subsection was amended to add the last two sentences.
31 F.R. 536, January 15, 1966.

Petitioner contends that Section 245 of the Act does not apply to him, and that Section 203(a)(7) contains no bar against crewmen. He contends that 8 CFR 245.1 and 245.4, the regulations which exclude crewmen, are an unauthorized limitation on the operation of Section 203(a)(7).

The motion to reopen was denied on the ground that an alien who enters as a crewman is not eligible for adjustment of status under Section 203(a)(7).

Section 203 provides for the allocation of 170,000 immigrant visas each fiscal year, 1/ among seven preference classes. Aliens who have close relatives in the United States qualify for 74% of the visas under the first, second, fourth, and fifth preferences. Members of the professions come within the third preference, which is allocated 10% of the visas. Another 10% is allocated under

1/ Section 201(a), 8 USC (1964 Ed., Supp. I, Section 1151(a).

the sixth preference to aliens capable of performing skilled or unskilled labor for which there is a shortage of qualified workers in the United States. These preferences, which were revised by the Act of October 3, 1955, 79 Stat. 911, represent a continuation of a system of preferences which had been in effect under prior law, although the first six preferences in their present form are broader in scope than their predecessors. 2/

The remaining 6% of the available numbers is allocated to the seventh preference, which is described in Section 203 (a)(7). This subsection provides for the issuance of "conditional entries" to aliens who may be broadly classified as refugees,

2/ Section 6 of the Act of May 26, 1924, 43 Stat. 155, provided preferences based on relationship of the immigrant to citizens or alien residents.

Section 203 of the Act, as originally enacted, Act of June 27, 1952, 66 Stat. 178, allocated the visas on the basis of skills, (first preference, 50%) and relationship" (second preference, 30%, third preference, 20%). Visas unused by the first three preferences became available for non-preference immigrants, with 25% reserved for a fourth preference on the basis of relationship. The Act of September 22, 1959, 71 Stat. 639 changed the composition of the second, third and fourth preference classes slightly.

from a communist or communist-dominated country, or from a designated area in the Middle East, who because of fear of persecution are unwilling or unable to return to the country from whence they came and who are not nationals of the country or area in which they make their application. This part of Section 203(a)(7) is a "codification of a previous practice under which aliens, usually refugees, were 'paroled' into the United States under various emergency legislative or executive provisions." In including this new provision as a permanent part of the Immigration Act, Congress continued an immigration policy which has existed since the close of World War II, whereby the United States has participated in the worldwide resettlement of refugees. See Senate Report 748, 89th Cong., 1st Sess., p. 16; House Report 745, 89th Cong., 1st Sess., p. 15. As the Committee Reports

indicate, Congress adopted the term "conditional entry" in order to avoid the unfavorable connotation of the term parole, which had been used under the Fair Share Refugee Act, Act of July 14, 1960, 74th Stat. 504. As further indicated in the reports, it was contemplated that the "conditional entry" procedure, in force under the prior temporary legislation, would be virtually the same under the new law. Thus, Section 203(g) and (h), 8 USC (1964 Ed. Supp. I) Sections 1153(g) and (h), are a codification of the procedure in effect under the Fair Share Refugee Act.

Section 203(a)(7), in addition to providing for the issuance of "conditional entries", includes the proviso that:

"immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."
[Emphasis supplied.]

The proviso thus provides for the issuance of "immigrant visas" to be used for "adjustment of status". The interrelation of the proviso and adjustment of status under Section 245 becomes apparent on examination of the terms of art employed in both Sections as well as the legislative history.

As Judge Levet points out in his decision: 3/

"The inclusion of the words 'adjustment of status' * * * [in Section 203(a)(7)] does no more than refer to the process of application; the presence of those words does not create any new substantive rights. Adjustment of status must still be carried out under Section 245. If there is any doubt that that was Congress' intention, one need only look at Senate Report 748, 89th Cong., 1st. Sess. 12 (1965) where it is said with regard to Section 203(a)(7) of the Act:

* * * * It is contemplated that such adjustment will be made under Section 245 of the Immigration and Nationality Act.'"

3/ Unreported decision in the United States District Court, S. D. New York, in Tai Mui v. Esperdy, 66 Civ. 316.

While the statement of the congressional intention is quite specific and serves to demonstrate that the term of art, "adjustment of status" under the provisions of Section 245, there are other cogent reasons for so construing the section in this manner. As already shown Section 203(a)(7) first sets aside numbers which shall be made available for conditional entries. The subsection then provides that in lieu of "conditional entries", "immigrant visas" may be made available in a number not exceeding one-half of the total, for the adjustment of status of aliens who have been physically present in the United States for at least two years.

Section 245(a)(3) provides that one of the indispensable requisites for adjustment of status is that "an immigrant visa is immediately available to * * * [the alien] at the time his application is approved." Section 245 of the Act is the only section which requires that an alien have an immigrant visa immediately available in order to adjust status.

The other provisions of the Act, Sections 244 and 249, 8 USC Sections 1254 and 1259, which provide for adjustment of status by aliens in the United States, do not require that an immigrant visa be immediately available. Thus, even in the absence of the express declaration in the Senate Report concerning the applicability of Section 245, the procedures provided within the Act indicate that adjustment is governed by Section 245, since only that section has the immigrant visa requirement.

Recapitulating then, we find Congress enacted a permanent provision concerning refugees. For refugees outside the country, Congress provided conditional entries together with procedural provisions which had not previously been an integral part of the Act. For refugees who have been in the United States for more than two years, Congress allocated immigrant visas for adjustment of status. No new procedural provisions were needed since Section 245 was already a part of the basic Act.

We come then to appellant's contention that since Section 243(a)(7) does not, by its specific terms, bar a crewman, he should not be barred by the limitations imposed under Section 245. The Attorney General has provided in 8 CFR 245.4 that an alien seeking to adjust status as a refugee, must do so in accordance with the provisions of Section 245. Accordingly, the Board of Immigration Appeals concluded that a crewman may not adjust his status, even assuming he could otherwise qualify as a refugee, since crewmen are specifically barred from adjustment under Section 245. Similarly, an alien who entered the United States without inspection would be barred, since such an alien does not meet the requirements of Section 245.

The Court will note that Congress amended Section 244 of the Immigration and Nationality Act by Section 12(b) of the Act of October 3, 1965, which reopened the benefits

of that provision to crewmen who entered the United States prior to July 1, 1964. While this amendment indicates some disposition on the part of Congress to moderate a policy which had theretofore barred crewmen from any adjustment of status, it is significant that the absolute bar of Section 245 was retained.

The restrictive policy toward crewmen had initially been reflected in Section 10 of the Act of July 14, 1960, 74 Stat. 504, which excluded crewmen from adjustment under Section 245. See Farrilis v. Liberty, 301 F.2d 429 (2d Cir. 1962). Still later, this congressional policy was extended to suspension under Section 244 by Section 4 of the Act of October 24, 1962. See Foti v. INS, 332 F.2d 424 (2d Cir. 1964).

Moreover, and again significantly, in the course of the legislative process which ultimately resulted in the 1965 Act, Congressman Feighan, the Chairman of the House Committee,

had introduced his own bill, H.R. 8662, which would have removed the crewmen exclusion from Section 245. This proposal was rejected and did not appear in the bill, as finally enacted. In an address this June to the annual convention of the Association of Immigration and Nationality Lawyers, Congressman Feighan stated:

"Other provisions of my bill which were subsequently modified were the advancement of the registry date to December 24, 1952 (the final bill cut it back to 1948); the eligibility for suspension of deportation of any alien regardless of the manner of his entry or the place from which he came (the final bill continued ineligibility for exchange aliens and natives of contiguous territory and adjacent islands); and the eligibility for Section 245 adjustment for those who entered as crewmen (the final bill barred crewmen, including potential [emphasis added].")

Against this background, the conclusion is inevitable that Congress, aware of the restrictions of Section 245, nevertheless limited the scope of the proviso to Section 203(a)(7) by withholding adjustment from crewmen, and those who enter without inspection.

The speech appears at 112 Cong. Rec. 13958, 13959 (daily ed. June 29, 1966).

It is not enough that an alien be a refugee. In order to adjust his status he must meet all of the qualitative and quantitative standards, in addition to those of the refugee. Those standards include the mode of admission under Section 245.

CONCLUSION

The decision of the Board of Immigration Appeals should be affirmed.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

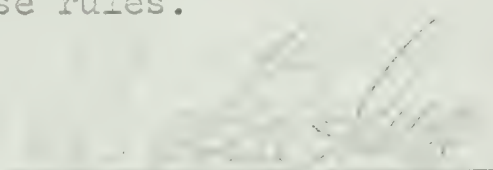
By: _____

CHARLES ELMER COLLETT
Chief Assistant United States Attorney
Attorneys for Respondent.

Dated:
December 21, 1966.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



CHARLES MARTIN COLLETT
Chief Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

UNITED STATES COURT OF APPEALS

THE NINTH CIRCUIT

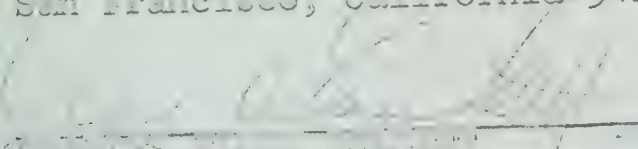
No. 21,060

The undersigned hereby certifies that he is
employee in the Office of the United States Attorney
the Northern District of California, and is a person
much age and discretion as to be competent to serve
ers.

That on December 21, 1966 he served a copy
the attached RESPONDENT'S BRIEF by placing said copy
penalty envelope addressed to the person hereinafter
ed, at the place and address stated below, which is
last known address, and by depositing said envelope
contents in the United States mail at 450 Golden
e Avenue, San Francisco, California.

RESSEE: Attorney for Petitioner:

DONALD L. UNGAR, Esq.
Phelan, Simmons & Ungar
1210 Mills Tower
San Francisco, California 94104



CHARLES EDWIN COLWELL
Chief Assistant United States Attorney

DATE:
JULY 21, 1966



N O. 21062 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERMA JEAN GOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
GERALD F. UELMEN,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

FILED

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WM. B. LUCK, CLERK

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Chief, Criminal Division,
GERALD F. UELMEN,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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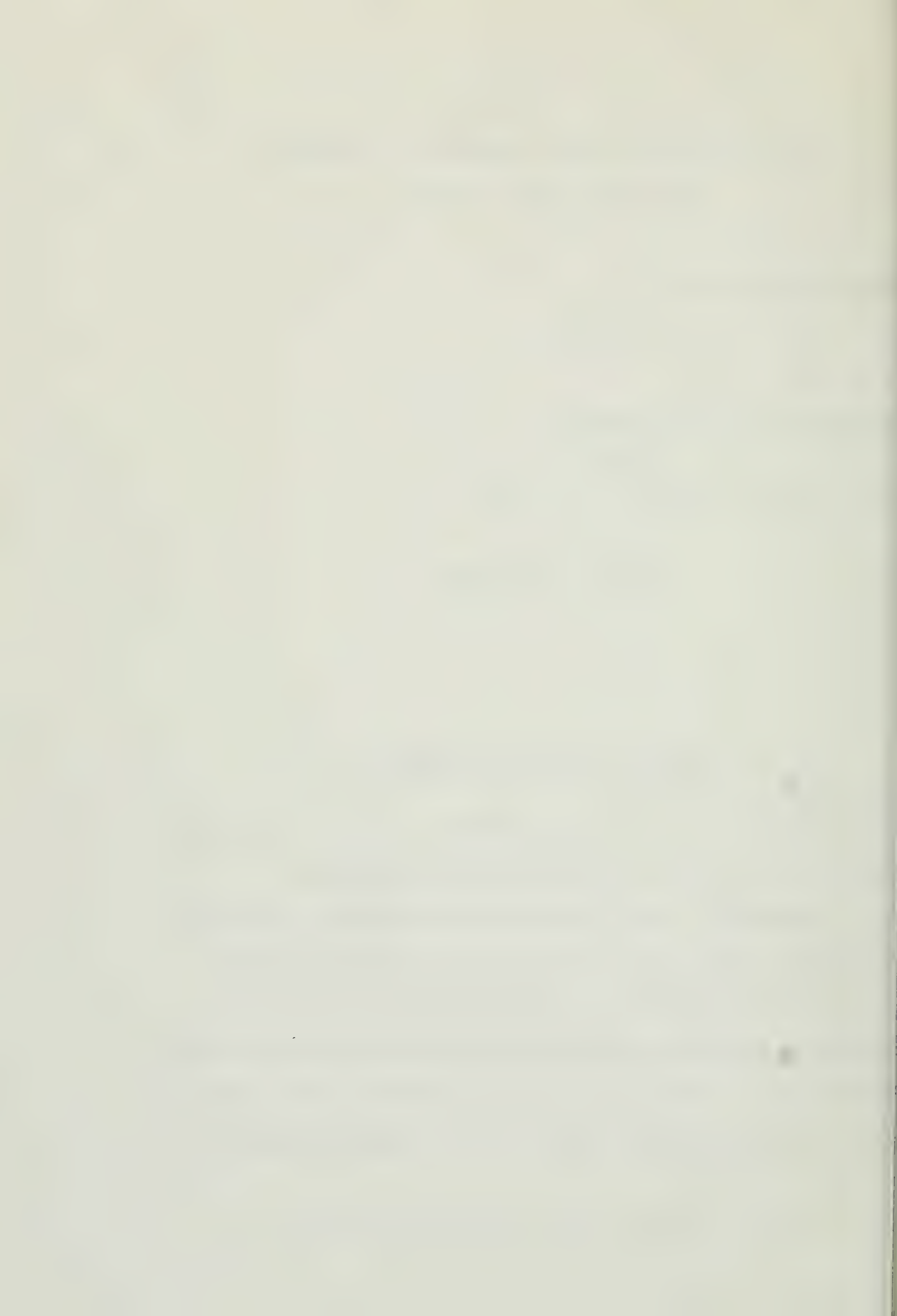
I

JURISDICTIONAL STATEMENT

This is an appeal from a conviction on two counts charging violations of the federal narcotics and marijuana laws.

On March 2, 1966, indictment No. 35877-CD, returned by the February, 1966 Grand Jury, was filed in the United States District Court for the Southern District of California, Central Division, superseding indictment No. 35762, which had been filed on February 2, 1966 [C. T. 2]. ^{1/} It charged appellant, Erma Jean Good, with violations of the federal narcotics and marijuana laws

^{1/} "C. T." refers to Clerk's Transcript of Record.



in five counts. Count One charged that, in violation of Title 21, United States Code, Section 174, she conspired with one Darryl Ewite Kelley, beginning on or about June 1, 1965, and continuing to October 1, 1965, to fraudulently and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, namely, heroin and cocaine, which had been imported into the United States contrary to law. Count Two charged appellant with aiding and abetting Darryl Ewite Kelley in the possession of heroin without registering and paying the special tax provided for by law in violation of Title 26, United States Code, Section 4724(c). Count Three repeated the charge in Count Two, but referred to the possession of cocaine by Darryl Ewite Kelley, rather than heroin. Count Four alleged that on or about October 1, 1965, appellant, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 1.7 grams of marihuana, which, as appellant knew, had been imported and brought into the United States contrary to law. Count Five charged that appellant knowingly and unlawfully acquired and obtained 1.7 grams of marihuana without having paid the transfer tax imposed by Section 4741(a), Title 26, United States Code.

On March 10, 1966, the appellant was arraigned before the Honorable Francis C. Whelan, United States District Court Judge. Appellant stood mute, and a plea of not guilty was entered to each count of the indictment [R. T. 14-15]. ^{2/} The case was set for trial

^{2/} "R. T." refers to Reporter's Transcript of Proceedings.



on March 21, 1966, at which time a defense motion for one week's continuance was granted [R. T. 22]. The case was called for jury trial on March 29, 1966, before the Honorable Francis C. Whelan, United States District Judge. Prior to trial, the defendant's motion to remove her counsel, filed in propria persona on March 28, 1966 [Supplemental Designation of Record], was heard and denied [R. T. 34]. In addition, a motion to dismiss the indictment, filed in propria persona [C. T. 10], was denied [R. T. 35] and a motion to suppress evidence [C. T. 25] was denied after the taking of testimony [R. T. 50].

At the conclusion of the government's case, the defendant's motion for judgment of acquittal on Counts One, Four and Five of the Indictment was denied [R. T. 295, 300, 302], and the government's motion to dismiss Counts Two and Three was granted [R. T. 298]. After the defense rested, the motion for judgment of acquittal was renewed and denied as to Counts One and Four, but taken under advisement as to Count Five [R. T. 406-07].

On April 5, 1966, the jury returned a verdict finding the appellant guilty as charged in Counts One, Four and Five [R. T. 503].

On May 3, 1966, Judge Whelan granted the motion for judgment of acquittal on Count Five, and sentenced appellant to imprisonment for a term of seven and one-half years on each of Counts One and Four, the sentences to run concurrently [C. T. 105; R. T. 517]. An oral motion for new trial on the ground of insufficiency of the evidence to support the verdict was denied [R. T. 514-15].

A timely notice of appeal was filed by the appellant, in propria persona [C. T. 106].

The United States District Court for the Southern District of California had jurisdiction of this case pursuant to Title 18, United States Code, Section 3231. Jurisdiction of this Court to entertain the appeal is derived from Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERRORS

The following three issues are raised in the argument presented in Appellant's Opening Brief:

- A. Did the trial court commit prejudicial error by admitting into evidence tape recordings of conversations between the appellant and a separately indicted co-conspirator?
- B. Was plain error committed by the admission into evidence, without objection, of conversations between the appellant and Customs Agents after her arrest?
- C. Was the trial court's denial of a motion, filed by the appellant one day before the trial, to remove her retained counsel, an abuse of discretion?



III

STATEMENT OF FACTS

In June, 1965, Darryl Ewite Kelley was introduced to the appellant, Erma Jean Good, by his roommate [R. T. 97]. In the succeeding months, he was called by the appellant, and agreed to rent automobiles for her use on two occasions [R. T. 105, 106]. In early August, 1965, Mr. Kelley called the appellant at a telephone number in Oakland, California supplied by her, and was asked by her to "make a run to Los Angeles, and pick up a package for her" [R. T. 108]. On August 3, 1965, he met the appellant at the Sportsman Club in Oakland, where she paid him \$150 to go to Los Angeles and pick up a package. Mr. Kelley supplied the appellant with the number of a friend's telephone where he could be reached in Los Angeles [R. T. 109-10]. That evening, he flew to Los Angeles, and took a cab to the home of his friend. At approximately 10:00 P. M. he received a telephone call from the appellant, who instructed him to go to Rosie's Cafe at 65th and Figueroa in Los Angeles, where he would see a man dressed in "black card, blue jacket, T-shirt". He was told to tell this man that Jean sent him, pick up a package, and call the appellant [R. T. 111-13]. Darryl Kelley went to Rosie's Cafe, and after waiting, saw a person meeting the description given him by appellant enter the cafe. After identifying himself, Mr. Kelley and this person left the cafe, entered Kelley's car and drove several blocks, then returned to the vicinity of Rosie's Cafe. They then got



into the other man's car, and Mr. Kelley was given a rolled-up plastic package [R. T. 115-16]. He placed the package in his pocket and got out of the car [R. T. 116-17]. At this time, he was placed under arrest by Customs Agents [R. T. 117]. The package was removed from his pocket by the agents [R. T. 285] and subsequent chemical analysis revealed that it consisted of two tubes containing 48.2 grams of cocaine hydrochloride, as well as 3 tubes containing 76.5 grams of heroin hydrochloride, all contained in a plastic bowl cover [R. T. 231-36, Plaintiff's Exhibit #3].

Mr. Kelley was taken to the Custom's Office, where he conversed with the arresting agents. After he was given an opportunity to consult privately with his attorney, he consented to the placing of a telephone call to the appellant, and to having this call tape-recorded by the agents [R. T. 120-22]. After calling twice and not reaching the appellant, Mr. Kelley left a message that he could be reached at the number of the Custom's Office. Shortly thereafter, at 11:28 a. m. on August 4, 1965, he received a call at this number from the appellant [R. T. 122-24]. This conversation was recorded by means of an induction coil attached to the ear-piece of the telephone [R. T. 126]. The recording was admitted into evidence as Plaintiff's Exhibit #5, and played to the jury [R. T. 133]. In this conversation, Mr. Kelley told the appellant that he threw the package in the bushes and recovered it after he had been arrested. The appellant told him to rent a car, drive back to San Francisco, and call her [Plaintiff's Exhibit #5, See Appellee's Motion to Augment Record on Appeal].



Darryl Kelley returned to San Francisco, accompanied by a Customs Agent. Upon his arrival, on the morning of August 5, he again called the appellant several times, finally leaving a message that he could be reached at the number of the motel where he was staying. Shortly thereafter, he was called by the appellant, and the conversation was again recorded with his consent [R. T. 141-44]. The recording was admitted into evidence as Plaintiff's Exhibit #6, and played to the jury [R. T. 144]. During this conversation, appellant asked Mr. Kelley what kind of automobile he was in, and told him to take the package to 23rd and Van Ness, and give it to a "heavy set, dark fellow" in a blue Chrysler, then to "come over to the Sportsman so me and you can talk, here? And I can give you some money." [Plaintiff's Exhibit #6, See Appellee's Motion to Augment Record on Appeal].

Darryl Kelley then proceeded to the corner of 23rd and Van Ness Streets in San Francisco, and parked his automobile [R. T. 148-50]. The intersection was placed under surveillance by Customs Agents [R. T. 209, 221]. A 1958 blue Chrysler containing two male Negroes was observed slowly circling the block twice at approximately 11:00 A. M. [R. T. 210-11]. Shortly after 12:30 P. M., a grey or blue Corvair containing two male Negroes double parked beside Mr. Kelley's automobile [R. T. 150-51, 212-13, 222]. The man driving the Corvair got out, walked past Mr. Kelley's car, and asked if he had seen the police, to which he replied "no". The man then entered a near-by market, came out with a soft drink, and drove away [R. T. 152].



Nearly two months later, on October 1, 1965, the appellant was arrested on a federal warrant in the City of Compton by an officer of the Compton Police Department [R. T. 266-68]. At the time of her arrest, the appellant asked permission to use the restroom, which was denied [R. T. 269]. She was advised of her constitutional rights, then transported, unhandcuffed, in the right front passenger's seat of a police vehicle [R. T. 269-70]. On the way to the police station, she was readvised of her constitutional rights [R. T. 270]. Appellant told the transporting officer she had in her possession "three or four joints", and asked for his permission to get rid of them. When such permission was denied, she reached into her brassiere, withdrew three hand-rolled cigarettes, and tossed them out the window of the moving vehicle. The officer immediately stopped and retrieved the cigarettes [R. T. 271-72]. Subsequent chemical analysis revealed that the cigarettes contained 26 grains of marijuana seed tops [R. T. 238, Plaintiff's Exhibit #4].

Later that evening, the appellant was interviewed at the Compton Police Station by a Customs port investigator. At that time, she was advised "that she didn't have to make any statements at that time without an attorney being present, and that if she did make any statements that they could be used against her . . . in a court of law" [R. T. 281]. The appellant then admitted throwing the marijuana cigarettes from the police car window, and admitted her address and telephone number in Oakland, California [R. T. 281-82], the same number which she had given to Darryl Kelley [R. T. 108].



Testifying on her own behalf, the appellant described her relationship with Darryl Kelley as "close" [R. T. 318], and stated that he had supplied her with narcotics on at least one prior occasion [R. T. 321]. She admitted the conversations contained in Plaintiff's Exhibits #5 and #6, explaining that she expected to pay Mr. Kelley \$200 for a "piece" (one ounce) of heroin [R. T. 328-30]. She also admitted possession of the marijuana charged in Count Four of the indictment, explaining that she had found it growing wild while on a fishing expedition in the San Joaquin Valley [R. T. 331].

IV

SUMMARY OF ARGUMENT

- A. Tape recordings of conversations between appellant and Darryl Kelley were properly admitted into evidence as admissions against interest. Interception and divulgence were voluntarily consented to by Mr. Kelley.
- B. Conversations between appellant and Customs Agents were admissible, as all necessary warnings were complied with. Even if they were not, failure to object at trial precludes raising the issue on appeal.
- C. The trial court's denial of appellant's motion, filed one day before trial, to remove her retained counsel, was not an abuse of discretion.



V

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TAPE RECORDINGS OF CONVERSATIONS BETWEEN THE APPELLANT AND A SEPARATELY INDICTED CO-CONSPIRATOR.

Appellant attacks the admission into evidence of the recorded telephone conversations between herself and Darryl Kelley on two grounds: that the conversations occurred after the conspiracy ended, and hence were inadmissible to prove the conspiracy; and that the consent given by Mr. Kelley to interception and divulgence of the conversations was not voluntary.

The first ground advanced by the appellant misconstrues the evidentiary rule allowing the admission of the statements of a co-conspirator. Simply stated, this rule "permits out of court statements of one conspirator to be used against another". Krulewitch v. United States, 336 U.S. 440, 443 (1949). The doctrine is merely one of the many exceptions to the hearsay rule. On a theory of agency, the acts and statements of one co-conspirator are attributed to all members of the conspiracy, hence admissible as evidence against all. See 72 Harv. L. Rev. 920, 984 (1959). Where the statements of a member of a conspiracy are admissions, however, they are admissible as evidence against the conspirator who made the statement without recourse to the "co-conspirator doctrine". Such is the case here.



The government will concede that, at the time these conversations occurred, the conspiracy between Erma Jean Good and Darryl Kelley had ended. This fact would preclude the use of out of court statements made by Mr. Kelley as evidence against the appellant. Such was the holding of both Krulewitch, supra, and Delli Paoli v. United States, 352 U.S. 232 (1956), relied upon by appellant. Both of these cases concerned the admissibility of a co-conspirator's statement made out of the presence of the appellant long after the conspiracy had ended. But here we are concerned with statements made by the appellant herself. The distinction was clearly spelled out by this Court in Murray v. United States, 250 F.2d 489, 491 (9th Cir. 1957), cert. den. 357 U.S. 932 (1958), in which the government had offered recordings of testimony recorded subsequently to the termination of a conspiracy to smuggle birds into the United States:

"These were admissible (just as other alleged statements of the defendants were admissible) as admissions against interest; admissible and offered only against the person making the admission, and not as statements of one conspirator, admissible against a co-conspirator, made during the course of the conspiracy. "

The appellant suggests that the jury should have been instructed that the conversation would be limited as an admission of the defendant, although no such instruction was requested in the



Court below. Even if it were, such an instruction would be unwarranted and unnecessary. The "co-conspirator" was testifying as a witness in open court, and the recorded conversations were part and parcel of his testimony. See McClure v. United States, 332 F.2d 19, 22 (9th Cir. 1964), cert. den. 380 U.S. 945 (1965). Moreover, the statements made by Mr. Kelley in the course of the conversation were, of course, in the presence of the appellant, hence admissible against her even if not in the course of the conspiracy. Sparf v. United States, 156 U.S. 51, 56 (1895).

Appellant further asserts that, even if considered an admission against interest, the statements of the appellant in the course of the recorded conversation were inadmissible because the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966) and Escobedo v. Illinois, 378 U.S. 478 (1964) were not given. Since this issue was not raised below, it is not cognizable on appeal for the same reasons stated in response to appellant's second specification of error, infra. Even if it were, a warning would not be required under either the Miranda or Escobedo decisions. As stated in Miranda, 384 U.S. 436, 477:

"The principles announced today deal with the protection which must be given to the privilege of self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way."

Similarly, the Escobedo ruling involved a situation where:

"The existence of the crime was apparent.



The police were seeking to identify the offender.

The accused had been taken into custody. " Kohatsu v. United States, 351 F.2d 898, 901 (9th Cir. 1965), cert. den. 384 U.S. 1011 (1966). Accord: Irwin v. United States, 338 F.2d 770, 777 (9th Cir. 1964).

The statements in question here were made nearly two months prior to the time appellant was taken into custody.

Turning to the second ground advanced by the appellant, that the consent given by Mr. Kelley to interception and divulgence of the conversations was not voluntary, as once stated by this Court, "this is a small horse soon curried". Wilson v. United States, 316 F.2d 212, 213 (9th Cir. 1963), cert. den. 377 U.S. 960 (1964). The record reflects that Mr. Kelley was given an opportunity to consult with his attorney before he agreed to the interception and divulgence. The only showing of "coercion" to meet the appellant's burden is the assertion that "it would be naive to believe that he did not give his consent because of expected leniency" [Appellant's Opening Brief, p. 20]. Such a contention has twice been rejected by this Court. Black v. United States, 341 F.2d 583 (9th Cir. 1965); McClure v. United States, 332 U.S. 19 (9th Cir. 1964), cert. den. 380 U.S. 945 (1965).

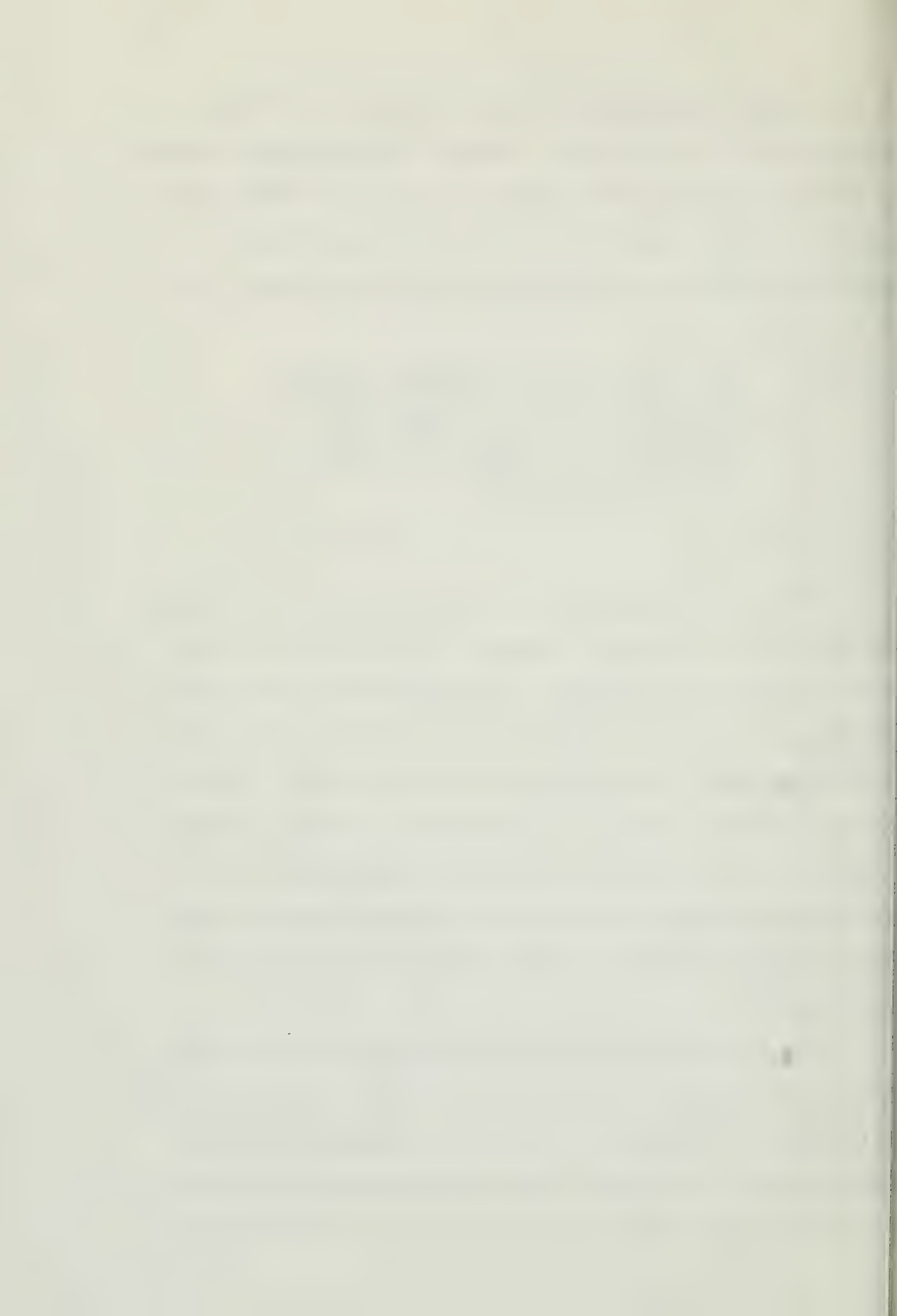
The cases cited by appellant in support of this contention are readily distinguishable. In Weiss v. United States, 308 U.S. 321 (1939), consent to divulgence of the telephone conversations was not obtained until after the calls had been intercepted, and the participants were ignorant of the interception at the time it occurred.

Cf. Campbell v. United States, 337 F.2d 396 (7th Cir. 1964), cert. den. 379 U.S. 983 (1965). Similarly, United States v. Laughlin, 222 F. Supp. 264 (1963) rested upon an express finding by the District Court that consent was induced by an implied threat of being indicted if the party did not cooperate. 222 F. Supp. at 268.

B. THE TRIAL COURT DID NOT COMMIT
PLAIN ERROR BY ADMITTING INTO
EVIDENCE, WITHOUT OBJECTION,
CONVERSATIONS BETWEEN THE AP-
PELLANT AND CUSTOM'S AGENTS
AFTER HER ARREST.

The trial of the appellant occurred after the ruling of the Supreme Court in Escobedo v. Illinois, 378 U.S. 473 (1964), but prior to the decision in Miranda v. Arizona, 384 U.S. 436 (1966). The Miranda ruling has no application to cases tried prior to June 13, 1966. Johnson v. New Jersey, 384 U.S. 719 (1966). Thus, only two issues are raised by the appellant's second specification of error: (1) Did the warning given to the appellant prior to her admissions after her arrest conform to the requirements of Escobedo v. Illinois? (2) If not, is the issue cognizable on appeal as plain error?

The only warning required by Escobedo is a warning of the right to remain silent. This is clear from the Court's distinguishing Crooker v. California, 357 U.S. 433, on the ground "that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to say anything



in response to the questions". 378 U.S. at 491-92. The requirement was clearly met in the present case, as appellant was advised "that she didn't have to make any statements at that time without an attorney being present, and that if she did make any statements that they could be used against her . . . in a court of law" [R. T. 281].

Even if this warning was insufficient, failure to object at trial effectively precludes raising the issue on appeal. In this respect, appellant's situation is identical to that presented to this Court in Toland v. United States, 365 F.2d 304, 306 (9th Cir. 1966), where it was held "failure to make objection to evidence either before or at trial precludes consideration of objections thereto on appeal unless good cause for such failure is shown".

C. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION, FILED ONE DAY BEFORE TRIAL, TO REMOVE HER RETAINED COUNSEL, WAS NOT AN ABUSE OF DISCRETION.

The granting of motions for continuance before or during trial rests within the sound discretion of the trial judge, and his action must be sustained in the absence of a clear abuse of discretion. Johnson v. United States, 291 F.2d 150, 153 (8th Cir.), cert. den. 368 U.S. 880 (1961). When the motion of appellant to remove her retained counsel is placed in context, the soundness of the trial judge's exercise of discretion becomes readily apparent: the case had already been continued one week [R. T. 22], the



government had five witnesses from out of the City of Los Angeles who were standing by for trial [R. T. 28], appellant's attorney had been in the case for six weeks, and the motion was filed one day before the case was set to go to trial [R. T. 34]. The standard to be applied in considering such a request is not whether "any harm would have been done to the prosecution's case" [Appellant's Opening Brief, p. 21], but, rather, whether "adequate cause" was shown for such a request. United States v. Paccione, 224 F.2d 801, 802 (2nd Cir.), cert. den. 350 U.S. 896 (1955). The trial judge held there was no showing that appellant's trial counsel was incompetent, nor is such a contention urged on appeal.

VI

CONCLUSION

There appearing from a review of the record no error prejudicial to the rights of appellant, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

GERALD F. UELMEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen
GERALD F. UELMEN



No. 21,063 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM S. BENNETT,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	
	<i>Appellee.</i>

APPELLANT'S OPENING BRIEF

JAMES MARTIN MACINNIS,
901 California Street,
San Francisco, California 94108,

JOHN MARK CHARGIN,
210 N. 4th Street,
San Jose, California,

Attorneys for Appellant.

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No. 21,063

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIAM S. BENNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California, Southern Division thereof, is predicated upon Section 2113 (b) of Title 18, United States Code.

This Court's jurisdiction to review the final judgment of the Court below is seen, inter alia, in Sections 1291 and 1294, Title 28, United States Code.

THE STATUTE INVOLVED

Section 2113 (b) of Title 18, United States Code, in effect at the time of the activities denounced by the Indictment, reads (and read), as follows:

“(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100.00 belonging to, or in the care, custody, control, management or possession of any bank, or any savings and loan association, shall be fined not more than \$5,000.00 or imprisoned not more than ten years, or both; or

“Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$100.00 belonging to, or in the care, custody, control, management or possession of any bank or any savings and loan association, shall be fined not more than \$1,000.00 or imprisoned not more than one year, or both.”

THE QUESTION INVOLVED

Can the scope of matters covered by Section 2113 (b) of Title 18, United States Code, be enlarged to include activities other than a *taking and carrying away of money or property from a bank against the will and without the consent of its custodian?*

THE TRIAL OF VARIOUS ISSUES LEADING TO JUDGMENT IN THE COURT BELOW

William S. Bennett, the present appellant, was indicted in Criminal Action No. 40467, United States District Court, Northern District of California, Southern Division thereof, as a co-defendant with Don C. Silverthorne who had been the president and

the person in active control of the now defunct San Francisco National Bank.

The two were indicted upon 39 counts out of which, generally, they were accused of entering into a conspiracy for misapplication, etc. of bank funds and of the substantive crimes denounced by Section 656 of Title 18 (misapplication of bank funds) and of Section 2 of the same Title (aiding and abetting).¹

The then defendant Bennett was acquitted of all counts except Count Two of the Indictment, specifying a violation of Section 2113 (b) of Title 18, United States Code, denominated "bank larceny".²

This Count read as follows:

"The Grand Jury further charges: That

"1. The Grand Jury realleges each and every allegation contained in paragraphs one and two of Count One of this Indictment as though fully set out herein.

"2. On or about January 22, 1964, in the City and County of San Francisco, State and Northern District of California, the defendant William S. Bennett did take and carry away, with intent to steal and purloin from the San Francisco National Bank, certain money aggregating \$8000 belonging to the bank, accomplished as follows:

"On or about January 23, 1964, one William R. Atkinson applied to the bank for a loan in the

(NOTE): References are to Reporter's Transcript, except where otherwise noted.

¹Clerk's Transcript of Record, Indictment.

²Clerk's Transcript of Record, 460 et seq.

amount of \$50,000 and the defendant Bennett acted as an intermediary between the said Atkinson and the said Silverthorne. In such capacity, the defendant Bennett advised the said Atkinson that there would be a loan fee or point charge of \$8000. In payment of said charge the said Atkinson executed and delivered to defendant Bennett a check payable to the San Francisco National Bank in the amount of \$8000 dated January 22, 1964. The defendant Bennett thereafter unlawfully cashed the above check in exchange for a cashier's check on January 23, 1964, in the amount of \$8000. The said defendant Bennett thereafter on January 27, 1964, deposited the proceeds of said cashier's check into his personal account under the name of Suisun Properties from which he later withdrew the said sum and converted it to his own use and the bank lost custody and control thereof."

The verdict of the trial jury was returned on February 18, 1966, and judgment was entered upon it on March 4, 1966, at which time the trial judge, Honorable Charles L. Powell, denied motions made pursuant to Rules 29 and 33 of the Rules of Criminal Procedure.³

SPECIFICATIONS OF ERROR

1. The trial Court erred in denying the motion of the then defendant Bennett for judgment of acquittal made pursuant to Rules 29 and 33 of the Rules of Criminal Procedure in respect of Count Two of the

³Clerk's Transcript of Record, 464.

Indictment, the count upon which the present appellant was convicted.

2. The verdict of the jury adverse to the present appellant on Count Two of the Indictment was not supported by substantial evidence in that, inter alia, Section 2113 (b) of Title 18, United States Code, refers to common law larceny and involves the trespassory taking of another's property where the owner does not intend to pass title and possession to the taker; there was no such evidence offered in support of Count Two at the trial.

A. Congress did not intend to include within the scope of Section 2113 (b) the common law crime of *obtaining property by false pretenses* nor is such crime within the purview of the statute.

3. There was no evidence out of which the jury could have found that the present appellant had and possessed specific criminal intent described by the Court's Instruction No. 25 which informed the jury that:

"... The money must have belonged to the bank"

and that

"... The defendant took and carried away the money with intent to steal and purloin".

4. The Court erred in refusing to charge the jury according to proposed instructions 9 and 9a of the then defendant Bennett in relation to the same Count Two of the Indictment, exceptions having been duly taken:

Instruction No. 9

“Re: *Indictment, Counts 2, 3, First Atkinson Loan*

“In Count 2 of the Indictment, the defendant Bennett is charged with unlawfully cashing a check for \$8,000.00, given him by the borrower, Atkinson, as a payment for fee, or points, and with obtaining in exchange therefor, a Cashier's Check in the sum of \$8,000.00.

“Of course, if this transaction were not unlawful, you will find the defendant Bennett not guilty. In determining whether the obtaining of the Cashier's Check, under such circumstances, was indeed unlawful, you are entitled to consider all of the evidence relating to methods prevalent at the San Francisco National Bank at or about the time in question for the purchasing of Cashier's Checks.

“You are also entitled to view all circumstances connected with this transaction including the fact, if it be a fact, that the defendant Bennett repaid the identical sum of \$8,000.00 to the San Francisco National Bank as a part of the same fee or points.

“In any event, proof of the unlawfulness of this transaction must be demonstrated to a moral certainty and beyond a reasonable doubt before you can find the defendant Bennett guilty thereof.”

Instruction No. 9(a)

“Re: *Indictment, Counts 2, 3, First Atkinson Loan*

“If the jury finds that the Cashier's Check for \$8,000.00 was in fact purchased by Atkinson at

the request or suggestion of Bennett, then Bennett must be found not guilty of the charges contained in Count 2."

5. The Court erred in refusing to grant the motion of the then defendant Bennett for a trial separate from the trial accorded his then co-defendant, one Don C. Silverthorne.

THE FACTS OF THE CASE

The conviction which is assailed in this appeal arises out of disclosures which were concomitant to the closing of the San Francisco National Bank in January of 1965. Bennett's business practice of acting as a guarantor in the loans of third persons with San Francisco National Bank for a fee, or consideration, and his returning of a portion of such "loan fee" to the bank focused upon him the attention of investigators who had been assigned to probe the apparent reasons for the San Francisco National Bank's failure.

In a number of loan-instances, the moral merits of which were litigated before the Court below, Bennett would sign a guaranty for an otherwise unsecured loan of bank funds to various investors, builders, etc., although receiving back secondary security himself; additionally, Bennett would impose a substantial loan fee or payment of "points" against the funds received by the borrower from the bank. Ordinarily the check representing such loan fee was drawn to Bennett himself, who, after depositing it, would remit one-half, or

more, to the Order of San Francisco National Bank, as the bank's share. While there was no illegality inherent in the carrying out of the business method described above, the general theory of the Indictment imported an accusation of criminality against Bennett and Silverthorne as follows:

1. That Bennett and Silverthorne both knew Bennett's financial condition to be insubstantial in relation to the total amount of the loans he guaranteed; and that

2. When Bennett tendered his checks to the bank for its portion of the "points", he somehow knew that Silverthorne would manage to misappropriate the money to his own private use.

As seen, Bennett was acquitted upon the general charges epitomized above, but was convicted by the trial jury out of the intendments of Count Two of the Indictment which, while involving the smallest amount of money mentioned in the dossier of accusations, bore the label of "bank larceny". The facts underlying this count differ but slightly from those which we have characterized as the general pattern of loan-guaranty transactions revealed at the trial.⁴

Sometime prior to January 23, 1964, a contractor named William R. Atkinson was introduced to Wil-

⁴Page 141 et seq.; testimony, William S. Bennett; Bennett had, in the past, engaged in the same type of transaction, that is to say, guaranteeing the loans of borrowers for a consideration with other financial institutions. In 1963, he had a line of credit with Bank of America in excess of \$800,000.00. This testimony (see pages 156-159) was uncontradicted. The record also showed that Bennett had complete files on every transaction (page 160 et seq.).

William S. Bennett by a "loan scout" named Noel Hooper.⁵ Atkinson's requirement was a loan of about \$50,000.00 and to this end he produced for Bennett, upon January 22, 1964, a financial statement prepared by an accountant showing his net worth to be \$771,000.00.⁶ Atkinson also executed an assignment for security purposes to protect Bennett on the latter's anticipated guaranty.⁷ The Atkinson-Bennett meetings extended over a period of about ten days.⁸

The exact amount of the loan, as granted by the bank to Atkinson, was \$58,000.00. While Atkinson originally swore that he did not know the loan was \$58,000.00 (rather than his requested \$50,000.00) until the money was already deposited in his account,⁹ his written agreements, when displayed to him, caused him to admit the contrary.¹⁰

Additionally, he had written a letter to Bennett on January 15, 1964, setting forth his knowledge that he would have to repay the bank \$58,000.00, the \$8,000.00 representing the fee, or points.¹¹

Atkinson was experienced in such transactions and understood the requirement for the payment of "points".¹²

⁵Page 11; testimony of William R. Atkinson.

⁶Pages 13-15; Id.

⁷Page 17; Id.

⁸Page 3 et seq.; Id.

⁹Pages 8, 36; Id.

¹⁰Pages 32-36; Id.; and see Bennett's Exhibit D as read to the witness.

¹¹Id.

¹²Page 16; testimony of William R. Atkinson; nor did Atkinson make any complaint about the amount of the "points" on his receipt of the money (Page 21).

Atkinson, after information concerning the deposit of the \$58,000.00 into his account on consummation of the loan had been disclosed to him, wrote his own check for \$8,000.00, the fee, or points, drawn to the order of San Francisco National Bank, and gave it to Bennett.¹³

(The conflicts in the evidence in this matter are slight and the statement made last above represents one of them. Bennett testified that he expected the borrower's check for \$8,000.00 to be drawn to his own order, as had been the case in numerous other transactions, but that Atkinson had already drawn the check when it was handed to him.¹⁴ The two men were standing in the main office of the bank when the incident transpired.)

Bennett immediately approached a teller's window at the bank, handed the employee Atkinson's check, and requested that a cashier's check be drawn to himself in exchange for it. This was done.¹⁵

(Here again, the evidence contained a minor conflict. Bennett claimed Atkinson was standing with him when the cashier's check was purchased; Atkinson said he knew nothing about the purchase of the cashier's check.)¹⁶

¹³Page 9, et seq.; testimony of William R. Atkinson.

¹⁴Pages 183-185; testimony of William S. Bennett.

¹⁵Page 184 et seq.; testimony of William S. Bennett.

¹⁶Page 10; testimony of William R. Atkinson; on cross-examination of Atkinson it was developed that he had sworn, in a civil action filed in San Francisco Superior Court, that the \$8,000.00 constituted an advance payment of interest and had asked sub-

It was an admitted fact, according to bank officials, that the usage of a check drawn to the order of the bank itself was one of the customary methods for purchasing a cashier's check.¹⁷ Another former bank employee testified that her understanding of the transaction was that Atkinson was the actual purchaser of the cashier's check.¹⁸

In any case, Bennett's possession of any part of the theoretical funds was less than transitory. While he had received the cashier's check for \$8,000.00 on January 23, 1964, and had later deposited it into an account of his own, he had, on January 22, 1964, in anticipation of the Atkinson transaction, executed and delivered his own check for \$4,000.00 to San Francisco National Bank as a payment to the bank for its share of the loan fee.¹⁹ And, on January 24, 1964, as a consequence of a conversation with Mr. Silverthorne, the bank president, he remitted the entire balance of the fee, that is to say, another \$4,000.00, to San Francisco National Bank, also by check.²⁰ While Bennett's explanation of the latter payment may not be binding upon this Court, it was uncontra-

stantial damages against the bank, Federal Deposit Insurance Corporation, Silverthorne, Bennett, et al.; see the appellant's Exhibit W which has been reproduced for the scrutiny of this court.

¹⁷Page 59 et seq.; testimony of Nancy Priola.

¹⁸Pages 86, 87, 90-93; this witness, Virginia Richards, had been an Assistant Vice-President of the bank; the form of economic sanctions imposed against her because she had clung to an opinion contrary to the Government's position is shown through pages 89 et seq.

¹⁹Pages 54-57; testimony of Nancy Priola.

²⁰Pages 119-124; Silverthorne admitted his receipt, on behalf of the bank, of the two \$4,000.00 checks.

dicted; he said, in essence, that it grew out of a discussion between Silverthorne and himself as to his obligation on their general proration of loan fees. It was similarly uncontradicted that Bennett, out of the same transaction, had, by check, paid an additional sum of \$1,000.00 to Noel Hooper, the loan scout, as a finder's fee.²¹ Accordingly, the transaction upon which the appellant was convicted was not only profitless but represented an actual loss of \$1,000.00.

From the perspective of the statute (Section 2113 (b), Title 18, United States Code) there was no evidence that the particular money had ever belonged to the bank or that it was ever in the bank's "... care, custody, control, management or possession ..."

ARGUMENT

I

SECTION 2113 (b) OF TITLE 18, UNITED STATES CODE IS ESSENTIALLY A REENACTMENT OF THE RULE DENOUNCING LARCENY AT COMMON LAW AND DOES NOT HAVE APPLICATION TO THE FACTS OF THIS CASE.

While the writer has had the benefit of the considerable research devoted to the applicable scope of Section 2113 (b) of Title 18, United States Code, by respective counsel in the case of *LeMasters v. United States* (No. 20376 upon the docket of this Court and presently awaiting decision),²² there emerges for con-

²¹Pages 187, 199-202. The Hooper transaction is delineated by the prosecutor on page 202.

²²James F. Hewitt, Esq., permitted usage of his entire work product.

sideration no reported decision in any American Court which offers a warrant for the enlargement of the statute's sphere of influence to cases even remotely comparable to the facts at bar. In *LeMasters* as well as in the Fifth Circuit's decision in *Thaggard v. United States* (1965) 354 Fed 2d 735, counsel were impelled to concede that the activities of the respective appellants could have constituted the crime of *obtaining money or property by false pretenses*. In the *Bennett* case, it is difficult to indulge such a concession even *ex arguendo*.

As seen from the briefs of counsel in *LeMasters*, the common law distinguished three separate offenses:

1. *Larceny*, a trespassory taking against the will of the owner;
2. *Obtaining money by false pretenses*, that is to say, acquiring both title and possession through false representations; and
3. *Larceny by trick*, in which, by the route of false representations, possession (although not title) is acquired.

The categories noted above are cited by both text and citations in:

- 47 Cal. Jur. 2d (1959), Article on Theft, Section 6;
- 2 Wharton's Criminal Law and Procedure (1957 Ed.), Section 509.

The record before this Court cannot, of course, support an inference of trespassory taking nor will there

be seen the element of fraud which is requisite to the perpetration of larceny by trick.

More importantly, it is implausible, out of our present record, to draw the conclusion that the San Francisco National Bank was ever the owner of the theoretical money involved in the transaction. Definitely, the money was never *possessed* by the bank and logic should not permit the indulging of an inference that *title* to the funds (out of some implied secret intention on the part of Atkinson) could have ever vested in the bank.

The bare fact is that \$58,000.00 was in the possession of Atkinson through his account in San Francisco National Bank and that Atkinson had title to such funds until he actively transferred all, or a part of, them. No ingredient of passage of title to the bank can be seen in the admitted facts because the \$8,000.00 merely passed from Atkinson to Bennett who had, beforehand, made an advance of a portion of the same theoretical funds to the bank itself. Similarly, the record will not disclose any false representations made by Bennett in the exchanging of checks.

(Query: If A hands B \$8,000.00 in cash asking him to deposit the same in A's bank and B then absconds with the money, it would seem obvious, wouldn't it, that B has stolen from A, and not from the bank?)

Because we can eliminate at once any notion of trespassory taking, since the bank teller intended to pass both title and possession, a further look at the

record would seem to scout, as quickly, the possible notion that the appellant may have committed the crime of obtaining money by false pretenses, which is essentially “cheating”, an entirely different crime at common law.

As will be reviewed, *infra*, the intent of Congress, in enacting Section 2113 (b) of Title 18, United States Code, was a specific one bearing no relation to the transaction now under study by the Court.

Thaggard v. United States, *supra*, was cited by Government counsel before the Court below as controlling anent our proposals concerning the limited scope of the statute. It is not.

In *Thaggard*, the dishonesty of the defendant was patent and his conduct indefensible. By mistake, his bank had credited \$43,000.00 belonging to another depositor's account to Thaggard; when Thaggard received this information through the route of his monthly statement, he promptly visited the bank and obtained confirmation concerning the erroneous credit. He then drew a check to himself for \$43,000.00 and the bank teller, after corroborating the apparent balance again, paid Thaggard the \$43,000.00. As would have been expected, the true facts were discovered in about ten minutes and an alarm was sounded for the appellant Thaggard who was subsequently in-

dicted, as Mr. Chief Justice Tuttle said, “under the Federal Bank Robbery Statute” and found guilty.

While (we think) the Fifth Circuit of this Court, because of the amorality of the appellant’s position, imported highly technical distinctions to the meaning of the dictum in *United States v. Rogers* (4th Circuit, 1961) 289 Fed.2d 433, its decision affirming the conviction of Thaggard was logically based upon the fact that the trial jury was properly, and precisely, instructed upon the literal language of Section 2113 (b) of Title 18, as follows:

“In this type of larceny prosecution, by the term, ‘by trespass’ as I have used it and as the law defines it, means the taking of the property, money here, without the owner’s consent. The intention of the owner not to part with title to the money when relinquishing possession of it to the defendant or the receiver, Thaggard in this case, is the essence of the offense of larceny, insofar as this prosecution is concerned. Now the correct distinction in cases of this kind seems to be, under the law, that if by means of any trick or fraud the owner of the property, the bank, the Union Bank and Trust Company, is induced to part with the possession only, *still meaning to retain the ownership*, the taking and removal by such means, where the required felonious intent is present and where the other elements are present, is, under the law, larceny. On the other hand, if the owner intentionally, that is, the Union Bank and Trust Company,

parts not only with the possession of the goods, the money, but with the ownership in the goods also, the offense of the party obtaining the money will not be larceny under the law in this case, but, if anything, the crime of obtaining money by means of false pretenses and subject to prosecution in the state court."

Thus, the trial jury in *Thaggard* had before it not only a well-stated distinction between *bank larceny* and the crime of *obtaining money by false pretenses* but it was given a philosophical basis, strained but existent, for finding that the bank, in delivering \$43,000.00 to Thaggard as a result of his fraud, still meant to retain the ownership of the money.

Accordingly, the *Thaggard* decision, whether or not motivated by the Court's understandable reluctance to permit the appellant to obtain any benefit from his own wrongful conduct, is by no means a mandate for extending the application of Section 2113 (b) of Title 18 to the facts in *Bennett*. As suggested earlier, this is not a matter in which the appellant makes the expedient outcry of being charged under the wrong statute.

The dictum in *Rogers*, as mentioned above, was a clear statement of principle. There, the Fourth Circuit of this Court flatly said:

" . . . We accept the defendant's premise that paragraph (b) of the Bank Robbery Act reaches only the offense of larceny as that crime has been defined by the common law . . ."

Of clear persuasion is the language of *United States v. Mangus* (1940) 33 Fed. Supp. 596 (N.D. Ind.) where the defendant had been indicted under Section 588 (b) of Title 12, United States Code, the historical predecessor of the statute involved here. This was said:

“It may be argued that it makes very little difference whether defendant is guilty of larceny or of obtaining money under false pretense, but Congress has limited liability under this criminal statute to whoever takes and carries away with intent to steal or purloin any property of an insured bank. If Congress had intended to cover the present crime it could easily have added to this statute the following words: ‘Or whoever obtains money or anything of value by false representations or falsely representing that a tendered check is good, shall be guilty.’ This Congress evidently did not intend, or it would have so provided, and, as criminal statutes must be strictly construed, I am convinced that the crime of larceny by trick has not been proved.”

And in *United States v. Patton* (3rd Circuit, 1941) 120 Fed.2d 73, the Court held that the common law definition of larceny demanded that there be a *trespassory taking and carrying away* which will not exist where both title and possession to money is obtained by fraud. This was said (page 75):

“... nowhere in the statute is the word ‘larceny’ defined. It is, however, well settled that when a Federal statute uses a term known to the common law to designate a common law offense and does not define that term, the courts called upon to

construe it should apply the common law meaning . . .”

II

CONGRESS DID NOT INTEND, BY ENACTING SECTION 2113 (b) OF TITLE 18, UNITED STATES CODE, TO PRESENT A NATIONAL COUNTERPART OF THE BREADTH OF ACTIVITY SPECIFICALLY DENOUNCED BY LAWS SUCH AS SECTION 484 OF THE CALIFORNIA PENAL CODE.

The legislative intent which underlay the passage of the law in question is well documented by public reports. Basically, it was legislation introduced in 1934 as part of a plan to curb gangster activities in the United States. Pointedly, it followed an outbreak of bank holdups which, theretofore, had not been accorded pertinent and adequate strictures.

See:

Congressional Record, S. 2841, 73rd Congress, 2d Session, 78 Cong. Rec. 2946-7 (1934).

As it passed the Senate on March 29, 1934, the bill read as follows:

Be it enacted etc., That as used in this act the term “bank” included any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

Section 2. Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, takes and carries away, or attempts to take

and carry away, such property or money or an (sic) other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be * * *.

Section 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be * * *.

Section 4. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be * * *.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon, shall be * * *.

Section 5. Whoever, in committing any offense defined in §§ 1, 2 or 3 of this act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or

attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be * * *.

Section 6. Jurisdiction over any offense defined by this act shall not be reserved exclusively to the courts of the United States.

78 Congressional Record, 5738 (1934).

When the bill reached the House of Representatives, it was finally passed in an amended form. As this Court has already seen, all of Sections 2 and 3 were eliminated, Section 4 became Section 2, 5 became 3 and 6 became 4; (a phrase not important to our argument was added to the revised Section 3). The bill then went into conference, a recommendation that the Senate agree to the House draft was adopted and the bill became law on May 18, 1934. Significantly, it was entitled *Bank Robbery Act of 1934*.

Ch. 304, 48 Stat. 783.

The progress of the enactment from committee draft to actual legislation tells a vivid story. Where the original Senate draft made specific inclusion of the common law crime of *obtaining money by false pretenses*, this specific element was eliminated after final debate by means which clearly do not carry the inference of inadvertence. Language which would have created an omnibus crime was *stricken*, not merely omitted.

How then may a reviewer hold that the present statute applies to the deleted subject matters by hint or implication?

When the law was finally passed, Congress had actually retained only those acts tantamount to taking by force and violence.

Our reference to *Mangus*, supra, recalls the previous existence of Section 588 (b) of Title 12, United States Code. The significance, both historically and from the pure perspective of legislative intent, of those portions of the Senate draft set forth above is illuminated by what happened thereafter. In 1937, Congress passed a law which effected the inclusion of burglary and larceny within the scope of Section 588 (b) of Title 12, United States Code and again *all mention of the crime of obtaining money by false pretenses was omitted*.

See:

Cong. Rec. H.R. 5900, 75 Cong., 1st Sess., 81
 Cong. Rec. 2731 (1937);
 Ch. 747, 50 Stat. 749.

A further refinement of the foregoing, particularly as it involves the contrasts between Section 2113 (b) of Title 18 and the revised Section 588 (b) of Title 12 is that Congress, in eliminating from the latter statute any mention of *consent of the owner*, followed completely our interpretation of the meanings which should be attached to the evolution of Section 2113 (b) of Title 18 into its present form—viz., since false pretense was originally to be included in the law under Senate draft of the 1934 proposed legislation, the word *consent* was specifically employed because the lawmakers were then offering a distinction between

the two crimes of *larceny*, on the one hand, and *obtaining money by false pretenses* on the other.

So we say, again, that such an element cannot be seen by implication in the present form of Section 2113 (b) of Title 18.

See:

Perkins, *Criminal Law* (57 Ed.) page 249, et seq.

We also attach considerable strength to the language of Mr. Justice Douglas in *Jerome v. United States* (1943) 318 U.S. 101 in which our thinking finds endorsement out of the following:

“It is difficult to conclude in the face of this history that Congress, having rejected in 1934 an express provision making state felonies federal offenses, reversed itself in 1937 and through the phrase ‘any felony or larceny’ adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks. It is likewise difficult to believe that Congress through the same clause adopted by indirection in 1937 much of the fraud provision which it rejected in 1934.

“But there is not the slightest indication that the interstate activities of gangsters against national and insured banks had broken down or rendered ineffective enforcement of state laws governing all sorts of felonies. On the contrary, the bill introduced in 1937 was much more selective and revealed no purpose to make a comprehensive classification of all crimes against the banks. *Moreover, the run of state felonies—forgery, rape, adultery, and the like—would seem to have*

little or no relevancy to the need for protection of banks against the wholesale activities of the gangsters of that day.” (Emphasis supplied.)

It seems redundant to conclude that, under the admitted circumstances by which Section 2113 (b) of Title 18 became law, Congress, had it so intended, could have included omnibus crimes such as those embodied within the scope of Section 484 of the California Penal Code. The fact is that language which would have extended the force of the proposed statute was considered and rejected. The silence of Congress, in this instance, cannot be construed as productive of any implied intent beyond the literal language of the law and it may also be pertinently said that if a logical “loophole” existed in the statute, Congress could have enlarged the bank robbery statute when the entire criminal code was revised in 1948 (such an expansion was specifically enacted where legislative needs were pointed out to Congress in instances such as interstate transportation of stolen vehicles and of stolen property generally).

United States v. Turley (1957) 356 U.S. 407;

Smith v. United States (9th Circuit 1956) 233 Fed.2d 744;

Bergman v. United States (6th Circuit 1958) 253 Fed.2d 933;

Cummings v. United States (10th Circuit 1961) 289 Fed.2d 903.

In finality: A review of the legislative intent demonstrates that the crime of obtaining money by false pretenses was not included in Section 2113 (b) of

Title 18. Even if it were, the facts in *Bennett* constitute neither bank larceny nor false pretenses.

III

INDEPENDENTLY OF THE PURPORTED APPLICATION OF SECTION 2113 (b) OF TITLE 18, THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT ANY CHARGE OF WRONGDOING AGAINST THE PRESENT APPELLANT.

It has been reiterated that Bennett does not merely claim that he was indicted under the wrong statute; his position has always been that *the activities specified by the evidence relating to the solitary count on which he was convicted were not violations of any law at all.*

At the close of the prosecution's case, mindful of the rule allowing the Government every favorable inference at such juncture,

Byrnes v. United States, 327 Fed.2d 825,

a motion under Rule 29 of the Federal Rules of Criminal Procedure was made on his behalf. At this time, although Bennett's two \$4,000.00 checks, each drawn to the order of *San Francisco National Bank*, had been marked for identification (his Exhibits AA [g] and AA [h]), the prosecutor had been able to keep the instruments out of evidence proper, even though their authenticity, fact of payment, etc., had been established by prosecution witnesses, on the general ground that they "could have been payments for any one of the projects or obligations of Mr. Bennett

on any number of things that he owed money to the bank for".²³

However, this exchange took place during the testimony of Alan R. Miller, a Government witness who was a bank examiner for Federal Deposit Insurance Corporation and who sat at the Government counsel table during the entire trial in order to render assistance out of his knowledge of documents and transactions. Since Miller had reviewed all bank records regarding Bennett, including Bennett's Loan Ledger, which at that time had been received in evidence, along with the entire transcript of his bank account, he was in a peculiarly good position to certify that the two \$4,000.00 checks were received by the bank for purposes other than "loan payments". As seen, while it was developed through Miller that the two checks were deposited and paid on the same date as the \$8,000.00 cashier's check, an interruption by the prosecutor by way of objection, but apparently not culminating in any ruling by the Court, prevented the completion of the record at this point.²⁴ It was not until the presentation of defense testimony that the two checks were actually admitted to the record and displayed to the jury.²⁵ Bennett's testimony as to the purpose and usage of the two \$4,000.00 checks was not contradicted.

²³Pages 76-81; testimony of Alan R. Miller, bank examiner, Federal Deposit Insurance Corporation.

²⁴Mr. Brosnahan's objection and later interruption appears on page 79.

²⁵Silverthorne admitted receipt of both checks (see pages 119-124) but the second \$4,000.00 check (Bennett's Exhibit AA [h]) was not admitted until the testimony of Bennett himself was taken.

The whole gambit of activity, then, under the accusation embodied in Count Two of the Indictment, was as follows:

1. Bennett accepted secondary security for a borrower at San Francisco National Bank, one William R. Atkinson, and agreed to guaranty Atkinson's loan of \$58,000.00.

2. The loan of \$58,000.00 was actually granted Atkinson and this sum was placed in his account after banking hours on January 22, 1964, and was thus credited to him as of the following day, January 23rd (which probably explains the reason for one of Bennett's \$4,000.00 checks to San Francisco National Bank bearing date of January 22).

3. Atkinson drew his own check for "points" to the order of San Francisco National Bank and handed the same to Bennett.

4. The entire custom and method of operation on the loan-guaranty transactions was that Bennett would deposit the borrower's check for the fee, or points, and then make remittance to San Francisco National Bank by his own check.²⁶

5. The \$8,000.00 Atkinson check was converted into a cashier's check to Bennett's order.

²⁶Bennett had sound practical reasons for insisting that the checks for points be surrendered to him first so that he could then make remittance to the bank. More than once he had been by-passed when the converse happened; there were other instances where borrowers, having been granted loans through the interposition of Bennett as a guarantor, returned and dealt with the bank themselves, in his absence (Pages 173-175, et seq.).

6. Bennett drew against the same check two \$4,000.00 checks of his own, each to San Francisco National Bank.

7. Bennett paid the loan scout, Noel Hooper, \$1,000.00 as a finder's fee and hence lost that amount out of the whole transaction.

It should be noted, also, that the loan to Atkinson was not spurious. Atkinson paid this loan;²⁷ his later loans from San Francisco National Bank, involved as we have seen in civil litigation, are not the concern of this record.

Can any significance, invidious or not, be drawn from the small area in which there appears to be a conflict in the testimony, namely, the manner of the procurement of the cashier's check?

First of all, the check bore no endorsement, a matter which scarcely bears the implication of the unusual since the testimony of Melville D. Bennett, the liquidator for Federal Deposit Insurance Corporation, was to the effect that a number of substantial checks drawn by the appellant had been used to purchase cashier's checks at San Francisco National Bank without any endorsement or other marking appearing on the back side of the check to show its usage or ultimate fate.²⁸

²⁷See Government's Exhibit 2(a), "Loan Liability Ledger of William R. and Ruth L. Atkinson", which has been reproduced for the scrutiny of this Court.

²⁸Melville D. Bennett's testimony on this point appears within pages 131-139.

The Government was able to produce the young teller, Margaret Wu, who had handled the cashier's check transaction. Miss Wu had no memory whatsoever of the event except that, from the papers shown her, she possessed an opinion as to who the legal "purchaser" was.²⁹ While it is true that Miss Wu contradicted her more experienced superior, Virginia Richards, an Assistant Vice-President at San Francisco National Bank, who had testified that Atkinson, not the appellant, was the purchaser, Miss Wu made it clear that there could have been no impropriety connected with the event when she testified to this effect:

"Q. You don't remember who brought you that check, do you?

A. No, I don't remember.

Q. Miss Wu, in the course of your work at San Francisco National Bank, if someone brought you a check drawn to the bank, not his own check, but the check of somebody else, and asked to buy a cashier's check with it, drawn to himself, you would require an endorsement of the check, wouldn't you?

A. I require endorsement or I would get okay from my superior."³⁰

In other words, it would seem to be clear that, since Atkinson's check was not endorsed, the young lady

²⁹Margaret Wu's testimony on these points appears between pages 204 and 212. Her testimony at page 218 discloses that she remembered nothing about the matter except the recognition of her own handwriting. She did not remember who had brought her the check.

³⁰Page 218.

who procured the issuance of the cashier's check, being unacquainted with Bennett, would have complied with all rules and procedures adopted by the bank. She added:

“Q. So far as you approved it and passed it on, everything you did was proper, wasn't it?

A. As I was told, this was the way I was supposed to do.”³¹

Recognizing that this Court cannot resolve conflicts between the statements of witnesses, it is nevertheless not inapropos to comment that Atkinson's own motivation for swearing that he was not the purchaser of the cashier's check in question was developed for the record during the prosecution's case when it was shown that he had filed Action No. 554,998 in San Francisco Superior Court against the bank, the Federal Deposit Insurance Corporation, Silverthorne and Bennett, claiming that the \$8,000.00 was an advance payment of interest and that he was accordingly entitled to recover hundreds of thousands of dollars in damages.³²

Finally, in all of the loan-guaranty transactions recalled by the many counts of the original Indictment, it had been the thrust of the prosecution's case that Bennett, who had complete records on his dealings both with the bank and the borrowers, and who made every fee payment to the bank by check, nevertheless should have known that the person in active

³¹Page 220.

³²See Bennett's Exhibit W, referred to, *supra*.

control of the bank, its president, to whom he usually delivered such checks, had sometimes diverted funds thus obtained from regular banking purposes. Bennett's acquittal upon such counts is persuasive of his utter lack of such guilty knowledge and should remove him from any possible criticism on the present transaction arising out of his delivery of the two \$4,000.00 checks.³³

As Nancy Priola, a Government witness, so clearly testified, the only method for paying any obligation, whatever its nature, to San Francisco National Bank, was by drawing a check to the order of the bank itself in the bank's legal name.³⁴

There was also no evidence out of which, in conformity with the language of Count Two, a jury could have concluded that the specific \$8,000.00 "belonged to the bank."

One therefore respectfully proposes that the element of criminal intent on the appellant's part does not exist upon the record of the Count Two transaction, that his original motion under Rule 29 for a judgment of acquittal should have been granted, and that, from the whole of the record, there is no *prima facie* proof of the commission by him of any crime.

³³See Clerk's Transcript, Verdicts.

³⁴Page 60.

IV

THE COURT ERRED, TO THE PREJUDICE OF THE PRESENT APPELLANT, IN REFUSING TO READ TO THE TRIAL JURY PROPOSED INSTRUCTIONS 9 AND 9(a), TO WHICH REFUSAL EXCEPTIONS WERE TAKEN.³⁵

For convenience, the proposed instructions of the appellant, as designated above, are repeated:

Instruction No. 9

“Re: *Indictment, Counts 2, 3, First Atkinson Loan*

“In Count 2 of the Indictment, the defendant Bennett is charged with unlawfully cashing a check for \$8,000.00, given him by the borrower, Atkinson, as a payment for fee, or points, and with obtaining in exchange therefor, a Cashier’s Check in the sum of \$8,000.00.

“Of course, if this transaction were not unlawful, you will find the defendant Bennett not guilty. In determining whether the obtaining of the Cashier’s Check, under such circumstances, was indeed unlawful, you are entitled to consider all of the evidence relating to methods prevalent at the San Francisco National Bank at or about the time in question for the purchasing of Cashier’s Checks.

³⁵We had included in our Specifications of Error, *supra*, a further point which had been advanced below, namely, the refusal of the trial court to grant this appellant’s motion for a separate trial than that involving his co-defendant. The court would have had discretion to grant this motion pursuant to Rule 14 but there is no reported decision offering comfort upon the notion that the denial could constitute an abuse of discretion (see Clerk’s Transcript, 57-59, 250-253). While we think the appellant could not have been convicted upon the instant count had he stood trial alone, the truth of the assertion cannot be demonstrated. Judge Powell’s efforts to provide a fair trial were outstanding.

“You are also entitled to view all circumstances connected with this transaction including the fact, if it be a fact, that the defendant Bennett repaid the identical sum of \$8,000.00 to the San Francisco National Bank as a part of the same fee or points.

“In any event, proof of the unlawfulness of this transaction must be demonstrated to a moral certainty and beyond a reasonable doubt before you can find the defendant Bennett guilty thereof.”

Instruction No. 9(a)

“Re: *Indictment, Counts 2, 3, First Atkinson Loan*

“If the jury finds that the Cashier’s Check for \$8,000.00 was in fact purchased by Atkinson at the request or suggestion of Bennett, then Bennett must be found not guilty of the charges contained in Count 2.”

Instruction 9 was a logical direction to the jury in view of the considerable testimony adduced by both sides as to the custom in San Francisco National Bank upon the issuance of cashier’s checks, the admission that such checks could ordinarily be purchased without the requirement of any endorsement on the back of the purchasing check, and the fact that the sole issue in conflict was whether Atkinson or Bennett became the legal purchaser of the \$8,000.00 cashier’s check.

Instruction 9(a) pointedly permitted the jury to make a finding determinative of the case, upon the factual issue last above noted.

In the light of these criticisms, it must be urged that the Court's instruction 25, which merely informed the jury that:

“ . . . The money must have belonged to the bank”
and that

“ . . . The defendant took and carried away the money with intent to steal and purloin.”

and which constituted the only instruction relative to the count was woefully insufficient and does not bear comparison with the trial Court's instruction in *Thaggard*, supra, which was accepted as a focal point for affirming that judgment on appeal.

CONCLUSION

Apparent factual issues existed as to the Indictment's numerous counts upon which the present appellant was found *not to be guilty*. In the matter at hand, happily, there can be found no substantial factual issue upon which the jury's conviction could validly have been predicated. Moreover, the record of events concerning the current accusation and the defense offered to it bears no relationship to the theoretical crime denounced by Section 2113 (b) of Title 18, United States Code.

It is respectfully submitted that the judgment convicting the appellant ought to be reversed.

Dated, San Francisco, California,

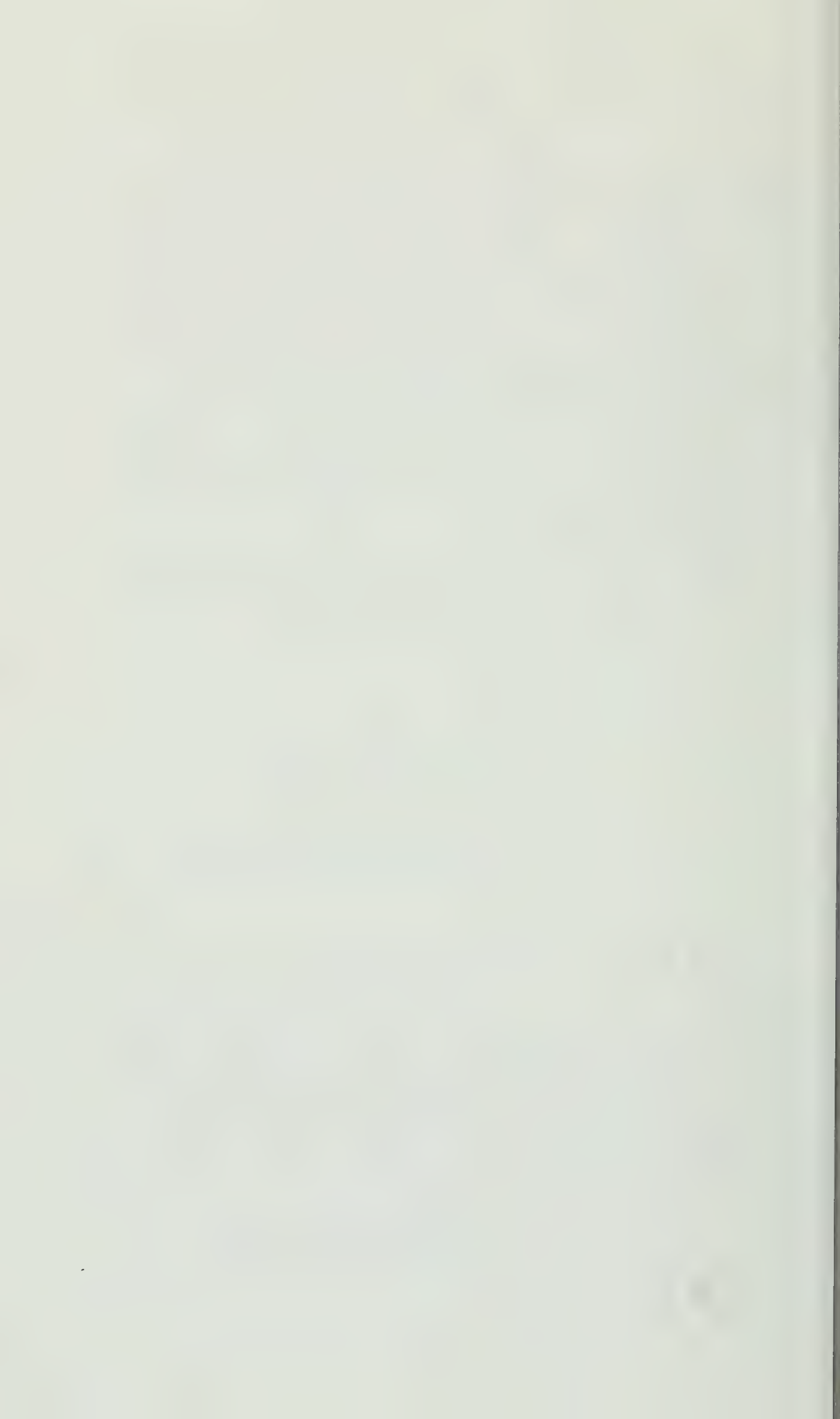
December 12, 1966.

JAMES MARTIN MACINNIS,
JOHN MARK CHARGIN,
By JAMES MARTIN MACINNIS,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES MARTIN MACINNIS,
Attorney for Appellant.



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ANTONIO TAPIA-CORONA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21066

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

WILLIAM P. COPPLE
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

FILED

AUG 31 1966

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BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

This case was commenced by the return of an Indictment on July 29, 1965 by the Federal Grand Jury sitting at Phoenix, Arizona (Transcript of the Record, volume one, item nineteen. Hereinafter volume one of the Transcript of the Record will be referred to as "RC," the Transcript of the testimony at the three hearings will be referred to as follows: the transcript of the hearing on the Motion to Suppress as M-TR, the number following will refer to the page number, and the

number following "L" will refer to the line number. The transcript of the November 8, 1965 proceeding will be referred to as 11-8-65 TR, the number following will refer to the page number, etc. The transcript of the hearing on November 9, 1965 will be referred to as 11-9-65 TR, the number following will refer to the page number, etc. The transcript of the trial will be referred to as TR, the number following will refer to the page number, etc.)

The Indictment charged the Appellant Antonio Tapia-Corona (the appellant will be referred to hereafter as "Corona") and two others, Rodolfo Lopez-Gonzales and Jesus Reyes-Carranza with unlawfully, wilfully and knowingly, and with intent to defraud the U. S. of A., smuggling and clandestinely introducing into the United States of America at Nogales, State and District of Arizona approximately one hundred (100) pounds of bulk marijuana, which should have been invoiced, all in violation of 21 U.S.C. 176a (RC Item 2).

On September 13, 1965 (there was no judge available at Tucson, Arizona during the month of August, 1965) Corona was to have been arraigned, and Corona asked for a continuance to obtain counsel (RC Item 19). On September 27, 1965, Corona was present with his counsel George M. Sheets and pleaded not guilty; Corona's counsel asked for twenty days to file motions directed to the Indictment and it was granted (RC Item 19).

On September 29, 1965 the Court set the case for trial on November 9, 1965 (RC Item 19).

On October 11, 1965, Corona by counsel filed a Motion for a Bill of Particulars as to the exact time and place at which the alleged crime was committed, the name and address of each and every person present at the time of the commission of the alleged offense, the facts and circumstances which the

Government will attempt to prove as parts of the alleged crime (RC Item 3). Mr. Sheets, attorney for Corona filed an Affidavit in support of the Motion alleging he and his client were without sufficient facts to prepare his defense, prevent surprise or make claim for double jeopardy (RC Item 4).

On October 13, 1965, the Government filed a Memorandum in Opposition (RC Item 5). On October 18, 1965 a hearing was had and the motion was denied (RC Item 19).

On November 1, 1965 Corona by his counsel filed a Motion to Suppress and to disclose identity of informers, on the grounds as stated by counsel that Corona "was not knowingly involved in any negotiations of any nature for the importation of marijuana or its sale. For the purpose of setting up the defense of entrapment of innocent persons (this defendant). For the purpose of acquiring positive testimony by any informer that this defendant was not in fact the individual who was responsible for importing the marijuana into the United States." (RC Item 6 pp 1-2)

(Separate motions to suppress by the other two defendants were filed on October 29, 1965. They are not included as part of the record.) The appellee filed a Memorandum in Opposition on November 1, 1965 which incorporated the Government's memorandum in opposition to their motions by reference. The Memorandum asserted border search and that since it was a border search, the request for disclosure of the name of the informer was without merit (RC Item 7).

The hearing was held on November 2, 1965 (RC Item 19).

The testimony of Charles Cameron and Randolph Aros was taken by the three defendants' counsel with the three

defendants present including Corona and an interpreter (M-TR 2-13).

The Court ordered the appellee to furnish to the Court, for in camera consideration, a statement of everything "Henry" had to do with this case, or any other person who furnished information to the Government who would be described as an informer (RC Item 19).

On November 4, 1965 the Government filed written notice and mailed copies to all three defense counsel that it would disclose the identity of the informer in Judge Walsh's chambers at 9:15 A.M. on November 8, 1965. (This notice was filed with the Court and was not entered on the docket sheet, item 19 of RC.)

The disclosure was made at the time and place noticed and the Government stated the full name of the informant, Henry Calcedo and that his present whereabouts were unknown and that the Customs Agency had spent all week looking for Henry Calcedo and that he should be coming into the United States since he had been paroled "into Mexico" (11-8-65 TR 2 L 4-15). This confusion on the part of this attorney was corrected at 1:00 P.M. 11-8-65 TR 5 L 4-9 i.e. that permission to parole Henry Calcedo, a Mexican alien, into the United States.) The Government had not intended to call Henry Calcedo as a witness (11-8-65 TR 4-L 15-17). Also, it was stated that there were two contacts with Henry Calcedo and the Government agents on November 19 and on the 20th and all that was stated by Henry Calcedo was that Henry Calcedo had some persons, some individuals from down south who had 100 kilos of marijuana to sell and wanted an American buyer (11-8-65 TR 3 L 19-4 L 5). The Court set a hearing at 1:00 P.M. for the continuance motions. Nothing new had been learned about the whereabouts of Henry Calcedo (11-8-65 TR 5). The Court instructed the

Government to do everything possible to produce this man for the trial and continued the trial to November 10, 1965. (11-8-65 TR 5 L 22 to 6 L 6).

The Government also arranged to have an agent show defense counsel where the marijuana was found (11-18-65 TR 7 L 2-3).

On November 9, 1965, the Court asked the Government to report on its efforts to find Henry Calcedo. At the hearing the testimony of Henry Washington was taken (11-9-65 TR 2-13). He testified he had been asked one week ago to find Henry Calcedo (11-9-65 TR 3 L 8-10). He had gone to all the places Calcedo had previously lived—Calcedo had always rented rooms as long as Washington had known him—Washington talked to people who knew him. He asked the Inspectors at the Port at Nogales to let him know if they saw him. He placed the requests at other Ports of Entry. Washington had looked for him at places where he would be and no one had seen him. He could not swear he had seen him on Friday evening (November 5, 1965). He thought he had seen him but by the time he could turn his car around and get back, he could not find him. He spent two hours looking for him there (11-9-65 TR 3-4).

On Monday evening (November 8, 1965) Washington received a report from a man he knew that there was a man in town reported to be the brother of one of the defendants who was "offering a 50,000 pesos reward for anybody that would get Calcedo." (11-9-65 TR 4 L 15-18). Other than that he had not heard anything. On cross-examination by the three defense attorneys it was brought out that with the one exception of Friday when he may have seen him, Washington had not seen Calcedo for three weeks; that Calcedo was a Mexican national and had no family that he knew of in Mexico;

that he had gone into Mexico every night in the last week, specifically looking for him and once during the day; that he had gone at least twice to the three different places he had rooms and that in his opinion, when asked by defense counsel, Henry Calcedo was afraid because there was a price on his head. He was also asked if he had reason to believe if Calcedo would not return to Nogales. He replied he had no reason to believe he was in Nogales. He was then asked if Henry Calcedo had been informed by any agent that his name had been revealed and the Court ruled that the attorney was arguing with the witness (11-9-65 TR 4-13).

Trial was held on November 10, 1965, November 12, 1965 and November 15, 1965. Corona during all the trial and at the sentencing had the interpreter at the counsel table, except when the defendants testified. Corona was found guilty by the jury and the other two defendants were acquitted (RC Item 19).

On November 17, 1965, Corona by his attorney filed a motion in arrest of judgment or for a new trial on the ground that no acts of Corona in the United States had been proved; that the informer had not been produced; that his statements as to what occurred in Mexico had not been controverted and that he was handicapped since the testimony of Cameron "repeated by the prosecutor through the interpreter was sorely limited." (RC Item 10). The Motion was denied on November 22, 1965, and Corona was adjudged guilty and sentenced to fifteen years (RC Items 12 and 19).

Corona then filed Notice of Appeal together with two separate affidavits to appeal in forma pauperis. The first one alleged he had property in Mexico he couldn't liquidate and the second one alleged he didn't (RC Items 14 and 15).

The Court granted leave to appeal in forma pauperis

on March 4, 1966 (RC Item 16).

This is an appeal pursuant to 28 U.S.C. 1291.

II. STATEMENT OF FACTS

On July 19, 1965 Customs Agent Randolph Aros was visited by Henry Calcedo who asked for Cameron and then Washington. He stated there were some men from the south who had a large quantity of marijuana to sell. Aros arranged to have Calcedo come back the next day (TR 31-32). Cameron returned and met with Calcedo on July 20, 1965 (TR 32-33).

On July 21, 1965 at 3:00 P.M. Charles Cameron met Corona and Henry Calcedo at the Safeway parking lot next to the International Boundary line in Nogales, Arizona. They were observed by Agents Aros and Horace Cavitt (TR 32-35; 211; 303-304). Cameron testified he speaks and understands Spanish and spoke to Corona in Spanish (TR 304). Henry introduced Cameron to Corona and Cameron gave his name as David (TR 305). Cameron told Corona he understood he had 100 kilos of marijuana. Corona stated he did and asked Cameron if he could buy it. Cameron stated he could only handle 30 kilos at \$50.00 a kilo and then agreed to buy 50 kilos (TR 306-307).

On Thursday, July 22, 1965 Cameron met Henry and Corona again at the same place (TR 308), again observed by Agent Aros (TR 36), and Cavitt (TR 211) and by Vincent Durant (TR 143). Cameron drove them out on the Tucson Highway about four miles, across from the Flagstone Motel followed by Aros (TR 309; 37). Corona asked Henry to deliver and Henry told him that all Corona asked him

(Henry) for was an American buyer and he had found him an American buyer and he, Henry, was not going to deliver (TR 309). Corona said he knew a man who would deliver and asked to meet Cameron at 5:30 P.M. (TR 310).

At 5:30 P.M. Cameron met Corona who was accompanied by a tall thin man wearing a hat. This meeting occurred at the Safeway parking lot (TR 310) and was again observed by Aros (TR 38) and Cavitt (TR 211). Cameron again drove them out on the highway followed by Aros (TR 39) but the new man did not like the delivery spot (TR 311). They returned to town and the new man showed them a spot along the Border (TR 311). Cameron objected that it was too well lit and too close to houses (TR 311-312). However Cameron agreed to accept delivery there and to meet at 11:00 P.M. that evening at the Safeway lot (TR 312).

Cameron met Corona and the new man at 11:00 P.M. He was told by Corona that the place was too well lit and was asked to take delivery farther west and a little north (TR 313). Cavitt, Searcy, Donovan, Aros and Durant were waiting at the point of delivery (TR 42; 146).

Cameron refused to have a change in the delivery point and Corona agreed to meet him Friday, July 23, 1965 at 10:00 A.M. (TR 314).

Cameron met Corona on Friday, July 23, 1965 at 10:00 A.M. and drove west of town and Corona gave alternate roads to take (TR 314 L 24-25).

They drove west on the American side opposite to where there was a house on a hill on the Mexican side and Corona told Cameron the marijuana was in that house (TR 315). Corona offered to deliver it to him there and at that time. Cameron asked for delivery that night at 9:00 P.M. (TR

315-316). They arranged to meet at the Safeway lot at 9:00 P.M. (TR 316 L 13-17).

Cameron showed the delivery spot to Aros after he left Corona off (TR 53 L 12-15).

That evening about 8:00 P.M. Agents Aros, Cavitt, Donovan, Searcy and Durant went to the delivery spot and hid themselves on a knoll nearby (TR 56-58; 213; 180; 256; 147). They heard noises coming from across the border, heard some thuds. In a little while, they saw two people, bent as if they were carrying heavy loads, pass by the knoll in the direction of the delivery spot. These two men were placed under arrest. The agents hid themselves again and awaited the arrival of Cameron and Corona (TR 59-63; 213-217; 180-186; 256-260; 147-155).

Cameron picked up Corona at the Safeway lot at 9:00 P.M. and proceeded to the delivery spot (TR 316 L 17-21). On the way to the delivery spot Corona offered him the keys to the three suitcases that contained the marijuana but Cameron refused them (TR 317-318). When they arrived at the delivery spot Cameron saw an object to his left and backed the car to where there were three suitcases. He turned the car toward Nogales (TR 318). They got out. Cameron was opening the trunk, while Corona walked over to the suitcases and was placed under arrest (TR 319). Cameron recognized Lopez-Gonzales that evening as having passed his car in the Safeway parking lot Thursday afternoon at 5:30 P.M. (TR 321).

Corona testified through the interpreter (TR 367 L 7-16) that he met Henry Calcedo as a taxi driver whom he asked to drive him to the hotel (TR 368 L 23-25). They discussed why Corona was there and that he, Corona, was in need

of money, and Calcedo told him how he could earn money by delivering objects of art (TR 369). Calcedo told him he would introduce Corona to a man whom the art objects were to be delivered (TR 369 L-13-25).

Corona testified he first heard marijuana when he met the American (TR 370 L 5-8). When they returned to Mexico Calcedo threatened to kill him if he, Corona, didn't return to the United States (TR 370 L 21-25).

Corona testified he first learned Cameron was a Customs Agent the next day (TR 371 L 2-7). Corona testified that Calcedo (sic) objected to delivering in a lighted area the day before it was delivered (TR 371 L 8-15).

Corona denied telling Cameron he had 50 kilos of marijuana to sell, or that he had brought the 50 kilos up from the south, or that he had an attorney in Tucson he normally sold to (TR 374). He testified he met Cameron the day following the evening he had met Henry Calcedo (TR 375 L 8-12). He then stated he, Corona, had arrived in Nogales the morning of the day he met Calcedo (TR 377 L 11-16). He did not recall hearing Calcedo refuse to deliver when he was out on the highway with Cameron (TR 381 L 10-13). Corona denied Cameron told him the deal was off at 11:00 P.M. on Thursday night (TR 386 L 19-22). Corona denied pointing out the man in the white shirt the next day (TR 387). Corona then admitted he did not know Cameron was a Customs Agent (TR 388 L 21-23). Corona testified he couldn't remember if he told Randolph Aros that he didn't know Cameron and that he had been paid \$10.00 to retrieve the suitcases (TR 389 L 8-11). He denied telling Aros he didn't know what was in the suitcases (TR 389 L 12-14 see Aros TR 79 L 8-24).

The other two defendants testified they were merely jump-

ing the fence (TR 400; 432-433) and that they did not know Corona (TR 405 L 7-8; 435 L 23-24).

III.

OPPOSITION SPECIFICATION OF ERRORS RELIED ON

1. There was no error in denying Corona's Motion for Judgment of Acquittal at the close of the evidence based on the alleged insufficiency of evidence;

2. There was no error in denying Corona's Motion for Judgment of Acquittal at the close of the evidence based on the Appellee's failure to produce Henry Calcedo;

3. There was no error in denying Corona's Motion for a Bill of Particulars.

IV.

SUMMARY OF ARGUMENT

1. The evidence of the smuggling and the acts of Corona in procuring the commission of the offense were sufficient to let the case go to the jury.

2. The Appellee used more than reasonable efforts to find Henry Calcedo, and the failure to produce Henry Calcedo was not through the fault of the Appellee.

3. The Motion for Bill of Particulars being based on the affidavit of Corona's counsel which alleged that Corona was without sufficient facts to prepare a defense, prevent surprise or making claim for double jeopardy were generalized statements and did not show sufficient grounds for the granting of the Motion.

V. ARGUMENT

1. The evidence of the smuggling and the acts of Corona in procuring the commission of the offense were sufficient to let the case go to the jury.

The appellee offered the testimony of Charles Cameron who saw the delivery spot at 10:00 A.M. and at about 3:00 P.M. (by Aros testimony TR 53-55) on Friday, July 23, 1965 and the suitcases with the marijuana were not there (TR 315). Cameron testified further that Corona told him on Friday evening, when he was driving him to the delivery spot that Corona was up to 2:30 or 3:00 that morning getting the marijuana back into Mexico when Cameron didn't want to accept delivery, Thursday night at 11:00 P.M.; Corona went on to say that the marijuana was safe from the water and that he had

packed it in suitcases (TR 317), Cameron testified that that morning Corona had told him the marijuana was in the house on the hill in Mexico and that his man was guarding it (TR 315).

The marijuana was not at the delivery point when Durant walked through there at about 8:00 P.M. on Friday evening when all the agents went to hide themselves (TR 167 L 15-19 and 168 L 4-7).

It is respectfully submitted there was sufficient evidence to find Corona guilty of aiding and abetting and procuring the commission of the offense of smuggling.

2. The appellee used more than reasonable efforts to find Henry Calcedo, and the failure to

produce Henry Calcedo was not through the fault of the appellee.

At the hearing of the Motion to Suppress on November 2, 1965, Charles Cameron testified Henry introduced him to Corona (MTR 12 L 13-17). On November 8, 1965 at a hearing this attorney disclosed the full name of the informer, and that the agents had been looking for Henry Calcedo for a week (11-8-65 TR 2 L 4-15).

On November 9, 1965 the testimony of Henry Washington was taken as to the efforts by the Government to find Henry Calcedo (11-9-65 TR 4-13. See also Jurisdictional Statement of Facts). The Court advised Corona's attorney that to that point he had made no showing as to what Calcedo would testify to if produced (11-9-65 TR 14 L 1-3).

On Friday, November 12, 1965, Corona's attorney had asked to have Henry Washington available at 3:30 P.M. and he was there. At 4:30 P.M. appellee's attorney reported Washington was outside, the Courtroom, called there by Corona's attorney, that he was still looking and had been unable to find Henry Calcedo, and offered to bring him in the Courtroom (TR 365 L 20-25). The Court said it was unnecessary to bring Washington in and have him report personally unless the defense wanted him to and Corona's counsel replied he did not (TR 366 L 1-6).

On Monday, November 15, 1965, at 1:00 P.M. the appellee's attorney reported that the Government was still unable to locate Henry Calcedo and that Washington received some more information that Tapia's brother and Onesimo's son were looking for him (TR 445 L 10-13).

In Velarde-Villarreal v. U.S., (9th Cir. 1965) 354 F. 2d 9, this Court stated at p. 13:

"We think that here is a special case in which the Government should be required to demonstrate its inability through reasonable efforts to produce Margarito."

In that case the defendant testified Margarito had made repeated calls on him to participate and the defendant had finally succumbed. Further the Customs agents were not ordered to look for Margarito nor did they testify they had looked for him. The rule appellant refers to in this case is set out in the concurring and dissenting opinion of Judge Pope beginning at p. 13.

In *U. S. v. Cimino* (2nd Cir., 1963) 321 F. 2d 509 at p. 512, it was stated:

" . . . No case of which we are aware has held that mere failure of production is reversible error, where diligent search for the special employee has been made. *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L. Ed. 2d 639, requires only that the Government identify its informant; the duty does not extend to production, *Williams v. United States*, 9 Cir., 273 F. 2d 781, 795-796, cert. denied 362 U.S. 951, 80 S.Ct. 862, 4 L.Ed.2d 868; *Eberhart v. United States*, 9 Cir., 262 F.2d 421, 422. There was no error in proceeding to trial without the missing witness. The granting of a continuance is a matter of discretion, see, e.g., *Smith v. United States*, 10 Cir. 273 F. 2d 462, 466, cert. denied 363 U.S. 846, 80 S.Ct. 1619, 4 L.Ed.2d 1729. We see no abuse of discretion in denial of the continuance."

It is respectfully submitted that the Government had used more than reasonable efforts in trying to find Henry Calcedo.

3. The Motion for Bill of Particulars being

based on the affidavit of Corona's counsel which alleged that Corona was without sufficient facts to prepare a defense, prevent surprise or make claim for double jeopardy were generalized statements and did not show sufficient grounds for the granting of the Motion.

In Appellant's Opening Brief at pages 14 and 15 it is alleged:

"Therefore it is elemental that preparation of an adequate and convincing defense would only be possible if opportunity were available to counsel to interview the witness prior to trial in order to overcome in advance the worse of the effects of surprise which occurred when the officer's testimony conflicted with that of defendant in so contrasting a manner."

It is respectfully submitted Corona was not entitled to the exact time and place at which the crime was committed, the names and addresses of each and every person who was present at the time of the commission of the "criminal acts" and the facts and circumstances which the Government will attempt to prove as parts of the alleged crime.

Furthermore, Corona was confronted with Charles Cameron at the hearing of the Motion to Suppress on November 2, 1965 (MTR 2 L 6-7 and 15). The first attorney to cross-examine Charles Cameron was Rodolfo Lopez-Gonzales' attorney William Netherton who asked Cameron, "Who is David Charles?" and Cameron answered, "That is myself in an assumed name." (M TR 13 L 22 and 25)

Where else did the knowledge of the assumed name of Cameron come from if not from Corona?

To seek who was present at the time of the offense is to seek indirectly what cannot be obtained directly, i.e., the list of the Government's witnesses. *Rodello v. U.S.* (9th Cir., 1960) 286 F. 2d 306, 310. Nor is it the purpose of a bill of particulars to give the defense the Government's case. *Rodello v. U.S.*, *supra*.

It is respectfully submitted the Motion for Bill of Particulars was properly denied.

VI. CONCLUSION

There was sufficient evidence of the commission of the offense of smuggling of marijuana; and of Corona's aiding, abetting and procuring the commission of the offense; and the Government having made more than reasonable efforts to find and produce Henry Calcedo. There was no error in the Government failing to produce him, and the Motion for Bill of Particulars was properly denied.

Respectfully submitted,

WILLIAM P. COPPLE
United States Attorney

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States

Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this
..... day of August, 1966, to:

GEORGE M. SHEETS
Attorney for Appellant
3941 East Broadway
Tucson, Arizona

No. 21069 ✓

In the

United States Court of Appeals

For the Ninth Circuit

In the matter of

LEGEND CITY, INC.,

Debtor.

PHILLIP NEAL ADAMS, et al,

Appellants,

v.

WALTER E. FULFORD, TRUSTEE,

Appellee.

BRIEF OF APPELLANTS

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By JOHN P. FRANK

JOSEPH E. MCGARRY

JOHN L. HAY

900 Title & Trust Building

Phoenix, Arizona

Attorneys for Appellant

FILED

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WM. B. LUCK, CLERK

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In the

United States Court of Appeals

For the Ninth Circuit

In the matter of

LEGEND CITY, INC.,

Debtor.

PHILLIP NEAL ADAMS, et al,

Appellants,

v.

WALTER E. FULFORD, TRUSTEE,

Appellee.

BRIEF OF APPELLANTS

JURISDICTION

This matter arises from proceedings for corporate reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C. Secs. 501-676. The petition of the debtor Legend City, Inc. was filed January 7, 1965 (R.1).¹ It was approved and a trustee was appointed January 11, 1965 (R.14) who duly filed his bond, qualified for

¹The record in this case consists of a volume of court filings plus the transcripts of various hearings. The court filings have been numbered consecutively from the first page through the last so that, e.g., an item on p. 400 will be cited "R.400."

the office and entered into his duties. The petition was at all times resisted by the secured creditors of the debtor, who bring this appeal here.²

On March 14, 1966, the trustee petitioned the court for issuance of trustee's Certificates of Indebtedness No. 3 in the amount of \$100,000 for the purpose of operating the debtor's business during 1966 and 1967 (R.538). The petition stated that if the certificates were not authorized, the debtor would have to be adjudicated a bankrupt or the Chapter X proceedings would have to be dismissed (R.538). The appellants filed a responsive pleading (R.559) and a memorandum (R.567) urging the court to adjudicate the debtor a bankrupt or to dismiss the Chapter X proceedings. On March 29, 1966, appellants moved the court for an order of sequestration of rents and profits from operation of the debtor's business (R.585). A hearing was held on these matters March 23, 24, 29, 30 and 31, 1966 (T. III),³ and on April 14, 1966, the court granted the trustee's petition and denied appellants the relief they sought (R.640, 660). This appeal from the order granting the trustee's petition (R.640)⁴ and from the order denying appellants' motion for sequestration (R.660)⁵ was taken April 18, 1966, appropriate bond being filed the same day (R.661, 663).

²These are Phillip Neal Adams and Charlotte Adams, his wife; L. Grant Robinson and Ethna C. Robinson, his wife; C. Birk Lefler and Peggy Kelso Lefler, his wife; and J. Talmadge Jones and Vera Jean Jones, his wife.

³ The record contains three transcripts of hearings. The transcript of proceedings of February 1 and February 15, 1965 will hereinafter be designated as T.I; the transcript of proceedings of March 5 and March 19, 1965 (two volumes) will hereinafter be designated as T. II; and the transcript of proceedings of March 23, 24, 29, 30 and 31, 1966 (three volumes) will hereinafter be designated as T. III.

⁴The court's orders were dated April 14, 1966, but appellants were not informed of the existence of them until April 15, and the notice of appeal filed by appellants is therefore erroneous by one day as to the date of the orders appealed from.

⁵See n. 4 *supra*.

The court below had jurisdiction to hear the appellants under 11 U.S.C. Sec. 606 and this Court has jurisdiction under 11 U.S.C. Secs. 521 and 47.

STATEMENT OF FACTS

A. Pre-litigation History.

The debtor, Legend City, Inc., an Arizona corporation, with approximately 10,300 shareholders (T. III 39), owned and operated an amusement park in the City of Tempe, Maricopa County, Arizona. The 58 acres on which the park is located contain numerous buildings which house merchandising and display facilities including restaurants, gift shops, theatres and other general merchandise stores, as well as a number of entertainment attractions and rides (R.1).

Operations of the park began on June 29, 1963 (R.116) and were suspended on October 31, 1964 (T. II 32). Appellants, the principal creditors of the debtor, were owed \$640,135.36 on the date of suspension (R.1). This debt was secured by a mortgage on substantially all of the real and personal property of the debtor. The mortgage included an assignment of all rents and profits and an assignment of whatever interest the debtor might have in the leases and licenses granted to persons operating within the park as concessionaires. This mortgage was dated March 16, 1964, and on its face bears seven per cent interest per annum, to be raised to eight per cent interest after a default (Exhibit I).⁶

Obligations to other secured creditors include the following:

1. \$15,000 on a note and mortgage dated March 17, 1964 (R.1).

⁶There were a number of exhibits introduced in evidence at the March, 1966 hearings which are part of the record on appeal. These will be identified by the exhibit number or letter affixed to it at the hearing in the District Court. See Appendix A to this brief for a full list of the exhibits.

2. Promissory note and mortgage for \$55,000 dated November 11, 1964 (R.1).⁷

3. A purchase money chattel mortgage with an unpaid balance of \$30,000 (T. II 137, T. III 181).

B. State Court Receivership.

As a result of defaults in the fall of 1964, appellants instituted a judicial foreclosure action in the Maricopa County, Arizona, state court, Cause No. 168904. After an adversary hearing, including the taking of testimony, the state court found that the following defaults had occurred:

" . . . The defendant Legend City, Inc. has failed to pay the real property taxes due for the first half of 1964 on the real property involved in this action, such real property taxes now being delinquent, that the defendant Legend City, Inc. has failed to pay the premiums for fire insurance and liability insurance covering the property involved in this action, such policies having lapsed prior to the filing of this action, that the defendant Legend City, Inc. has failed to pay Federal withholding taxes and that the Internal Revenue Service has filed of record its lien in connection with such taxes, that the defendant Legend City, Inc. has been financially unable to maintain any security force or other method of protecting and preserving the property involved in this action and has temporarily ceased operation of the business known as Legend City . . ." Order Appointing Receiver, Civil Cause No. 168904, December 11, 1964.

The trial court found Legend City to be insolvent and appointed a receiver. A state receiver duly took possession until he surrendered it to the federal receiver in these proceedings (R.76). The state court receiver has filed a report and account but has not been discharged.

⁷This note and mortgage were executed less than four months before the Chapter X proceedings for an antecedent debt and may be a voidable preference as to the security interest.

C. Chapter X Proceedings.

1. Preliminary and 144 proceedings, and evidence thereon; role of the SEC.

While the state court foreclosure was under way, the debtor on January 7, 1965, filed a voluntary petition for reorganization under Chapter X, Sec. 128 of the Bankruptcy Act, 11 U.S.C. Sec. 528. The trial court ex parte approved the petition and appointed Walter E. Fulford as trustee on January 11, 1965 (R.14). This order is referred to hereinafter as the Chapter X Court's initial order of approval. That order specifically stayed the pending mortgage foreclosure action and, among other things, authorized the trustee to operate and manage the amusement park owned by the debtor.

Appellants on January 19, 1965 moved for an order to modify the court's initial order of approval, for an order vacating the stay of the mortgage foreclosure proceedings and for an order dismissing the Chapter X proceedings (R.27, 41). The debtor's petition had alleged that any plan of reorganization would have to modify the rights of secured creditors. By virtue of Sec. 179 of the Act, 11 U.S.C. Sec. 579, the consent of appellants as holders of more than two-thirds of the total secured indebtedness would be required for any plan. In their motion to modify, appellants alleged that they would not then or thereafter consent to any plan of reorganization which modified or altered their rights in any way. Appellants therefore asserted that the petition was not filed in good faith as defined in Sec. 146(3), 11 U.S.C. Sec. 546(3), since there was no reasonable possibility of a reorganization plan ever being effected.

The first hearing in this matter was on appellants' motions on February 1, 1965, and at that time appearances were made by appellants as secured creditors, the debtor corporation, the trustee, other secured creditors and the Securities and Exchange Commission. The Commission appeared by authority of Secs. 161 and 208, 11 U.S.C. Sec. 561 and 608. They supported the continued

operation of the park by the trustee in this and in all subsequent hearings (T. I 27-33, T. II 80-85, 250-52, T. III 469-72).

At this initial hearing, no new factual information was presented to the court concerning the financial situation of the debtor beyond the material contained in the pleadings. On February 1, 1965, the district court denied all motions of appellants (R.84).

Following the denial of appellants' motion, the trustee petitioned the court for an order authorizing him to issue a certificate of indebtedness to the extent of \$10,000 (R.90). This application was for the purpose of maintaining the amusement park until the plan of reorganization was filed, which under the court's initial order of approval was due by April 5, 1965. The appellants opposed the issuance of such certificate of indebtedness.

The hearing on the application for this certificate was the first actual review by the court of values. The amount of stock which had been sold in this enterprise was something over \$3,200,000.⁸ The value which the petition alleged for the land and personalty owned by the debtor was \$3,762,286.49 (R.1), taken directly from the debtor's books of account. However, the actual testimony at the first certificate hearing by the court's trustee was that the value of the real property was approximately \$900,000 and that the salvage value of personal property was \$250,000 to \$300,000, making a total value for the assets of the corporation of \$1,150,000 to \$1,200,000 (T. I 163-64). A professional real estate appraiser, qualified as an M.A.I., Mr. John T. Hansen, testifying for appellants, set the land value only at a maximum of approximately \$450,000 (T. I 79). Thus, given the most optimistic statement of values as shown on the record, the assets at best had a value of approximately \$1,200,000, to be contrasted with then admitted obligations to creditors of over \$1,000,000. If one modifies this to take into consideration the

⁸The exact figure as shown in the December 31, 1964 balance sheet (which was filed August 16, 1965) was \$3,292,796.07; see Exhibit A, which is appendix D to this brief.

view of the only qualified appraiser who testified, the values were about \$750,000 as against obligations of \$1,000,000.

Nonetheless, the district court entered an order authorizing the issuance of the certificate of indebtedness on February 16, 1965 (R.100). The order provided that the certificate should be paid out of the debtor's funds by August 16, 1965. It has in fact never been repaid, and the holder of the certificate, The Pioneer Bank of Arizona, has filed a petition with the district court to compel its payment (R.524). The court has never granted permission to the trustee to extend or exceed the due date of the certificate so the certificate is, in fact, in default and has been in default since August 16, 1965.

The court's initial order of approval provided that the trustee was to prepare and file a plan of reorganization or a report of his reasons why a plan could not be effected on or before April 5, 1965, and that a hearing on such plan or report or a hearing pursuant to Sec. 236(2), 11 U.S.C. Sec. 636(2), would be held on May 7, 1965 (R.14). In addition, the trustee was to prepare a statement of his investigation of the property, liabilities and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof on or before March 12, 1965 pursuant to Sec. 167(5), 11 U.S.C. Sec. 567(5).⁹

Despite this order, the trustee has not to this day filed a plan of reorganization nor has he filed any of the reports required under Sec. 167, 11 U.S.C. Sec. 567, on the debtor's financial status. No full report of the conduct, property, liabilities and financial condition of the debtor or report on the desirability of continuance of the business has ever been filed with the court during the year and one half the Chapter X proceedings has been pending.

As has been noted, the trustee originally sold a \$10,000 cer-

⁹A first extension on these requirements was given by the court ex parte (R.107), and thereafter a continuance was granted, which to date has amounted to an indefinite stay, on March 24, 1965 (R.137).

tificate of indebtedness. On March 22, 1965, he sought a second certificate of indebtedness of \$50,000 (R.112), the purpose of which was to finance park operations in the summer of 1965. The new amount was to be repaid out of operating income that summer. This certificate was authorized on March 25, 1965 (R.139), but has not in fact been paid and has been in arrears since September 21, 1965.

The 144 hearing was held between March 5 and March 19, 1965. The issue in the 144 hearing was whether the original petition had been filed in good faith in view of the fact that, as developed above, there was no possibility of reorganization. The court ruled against appellants on the 144 hearing (R.168) and, there being no appeal from that order,¹⁰ the proceedings are of no further consequence except for one item of fact. The testimony at this hearing was that the net operating loss of the debtor during 1964 was \$85,000 (T. II 37). Later financial statements filed by the trustee show the true loss to have been \$138,795.33 for the last eleven months of 1964. Exhibit A, Appendix D to this brief.

2. Court proceedings between the 144 hearing and Certificate No. 3.

The 144 proceeding was concluded in March of 1965. The application for Certificate No. 3 was made in March of 1966. During this twelve-month period, the following legal proceedings occurred:

(a) The most significant legal proceedings during this one year period is in fact a negative—there were no legal proceedings concerning a plan of reorganization and appellants contend that there should have been. As noted above, by virtue of the court's order of March 24, 1965, giving the trustee an indefinite time in which to file a reorganization plan, there never was a

¹⁰An appeal was taken but was later dismissed in accordance with a stipulation which will be described later.

reorganization plan filed and there has never been a hearing concerning any such plan.

(b) On April 13, 1965, the trustee filed a petition for permission and authority to reject certain executory contracts of the debtor pursuant to Sec. 116(1), 11 U.S.C. Sec. 516(1), of the Act which allows the court to "permit the rejection of executory contracts of the debtor . . ." (R.174, 185). This involved concessionaire contracts in which appellants had a security interest. The appellants resisted the petition on the grounds that the contracts sought to be rejected were not, in fact, executory, but represented leasehold interests or estates not within the contemplation of Sec. 116(1). Following hearing and extended negotiations, a written stipulation was entered into by the Chapter X trustee, the concessionaires involved, the appellant-mortgage holders and, to a limited extent, the debtor corporation (R.299). This stipulation was followed by a master's report made pursuant to the stipulation, which allowed the trustee and the experienced park operator with whom the trustee had an operating contract approved by the court (R.145) to operate the park until November 1, 1965, under interim revised agreements with the concessionaires. Under the stipulation and the report and the order which followed, all parties were to be free to reassert their rights and position at any time after November 1, 1965 (R.299, 375).

(c) On November 12, 1965, appellants moved the court for an order modifying the stay to permit resumption of their pending state court mortgage foreclosure action (R.450). A stipulation was entered into and an order issued allowing the foreclosure to proceed under certain limited conditions and based on a certain time schedule (R.502). The order, dated December 13, 1965, gave the trustee the option to have the amount and validity of appellants' claim determined in U. S. District Court rather than in state court, if he exercised that privilege prior to June 1, 1966. It also prohibited appellants from having final judgment entered by the state court in the mortgage foreclosure proceedings and

prohibited them from having any judicial foreclosure sale, without prior consent of the district court.

(d) Meanwhile, neither of the earlier trustee's certificates had been paid. On January 1, 1966, the Pioneer Bank of Arizona, which had purchased Certificate of Indebtedness No. 1, moved the court for an order directing payment of that certificate (R.524). The appellants objected to the granting of that motion on the grounds that Certificate of Indebtedness No. 1 had specifically been made prior only to the payment of other obligations of the estate save and except for real and personal property taxes, and that by December 31, 1965, almost \$40,000 in real property taxes assessed against the debtor were due and delinquent. The hearing on this petition had been repeatedly postponed at the request of the trustee.¹¹

3. Operating expenses and financial situation, March 1965-March 1966; the financial situation at the time of the instant proceedings.

As noted above, as of March 1965, on the basis of the record in these proceedings, the assets of Legend City were either approximately \$200,000 more than the liabilities or approximately \$250,000 less than the liabilities, depending upon which view was to be followed. During this year the trustee, who had stated that a feasible plan of reorganization could be formulated by April 5, 1965 (R.74), entered into a court-approved contract with an experienced amusement park operator, Mr. T. H. Browning of T. H. Browning & Associates, Detroit. The trustee had felt that the deficiency of the park was not in attendance but in management and that with proper management the park could service its indebtedness and show a profit (R.152). He forecast for the operating season 1965 an estimated income of \$731,468 and an estimated expense of \$473,666 (R.162-63). In fact, the event belied this optimism. The trustee's December 31, 1965 balance

¹¹Under the laws of the State of Arizona, unpaid property taxes are prior in right to even the first mortgage lien of appellants. *Ariz. Rev. Stat. Ann.* Sec. 42-312 (1956).

sheet shows operating income of \$652,642.93 and total operating expense of \$697,040.85.¹² Given these figures, there was a loss of \$44,397.92. However, these are operating costs only. If an adjustment is made for debtor incurred depreciation and interest, those taxes which were paid, and those administrative expenses of the trustee which were paid, the total expenses were \$858,980.83, for a 1965 calendar year loss of \$206,337.90.¹³

On March 14, 1966, the trustee petitioned for issuance of still another trustee's certificate of indebtedness, this one to be in the amount of up to \$100,000 (R.538). This is the instant proceedings from which appeal has been taken and details concerning it are set forth in the next section. However, using the period of March-April, 1966, as a convenient date for summarizing valuation figures, the assets and liabilities of the enterprise as of that period are as follows:

(a) Values.

The trustee's estimate of value as of this period, including all assets and assuming as he did that the park can be sold as a going concern amusement park, is \$1,650,000. This represents a land value of \$900,000 (T. III 381) and a going concern value of \$750,000 covering all buildings, rides and equipment (T. III 386). On the other hand, if it cannot be sold as a going concern, then the trustee's estimate of the salvage value of the equipment is \$250,000 (T. III 386). The trustee gave no basis for his "going concern value" figure. It was not based on the prior operating history of losses of the debtor, although he did state that the park would be worth more than it is now worth if it were operating at a profit (T. III 149). It is also not based on any new services or plans by which the loss picture could be changed,

¹²Figures are taken from Exhibit 5, the income and expense portion of which is attached as Appendix B to this brief.

¹³See the trustee's reconciliation of December 31, 1965, Exhibit 8, attached to this brief as Appendix C.

since no such devices or plans were presented at the 1966 hearings.¹⁴

These opinions of value include no evidence by an appraiser. On August 4, 1965, the court authorized the trustee to retain an appraiser to prepare an appraisal but no appraiser's report has even been submitted by the trustee (T. III 381). The appellants' evidence of value is reached by the \$450,000 land value of its appraisal plus the trustee's \$250,000 salvage value of equipment (T. III 384).

The value estimates therefore range from \$700,000 (appellants'); \$1,150,000 (trustee's land plus salvage); and \$1,650,000 (trustee's land plus going concern valuation). In evaluating the figure which depends upon a sale of the enterprise as a going concern, the court may consider that there has been no firm purchase offer in the one and one half years of this proceedings.¹⁵

¹⁴"Q (by Mr. McGarry) With reference to this going concern value that you told the Court about, Mr. Fulford, as I understand it, Mr. Kelly, your M.A.I., told you that with what you had available by way of facts and figures, he could not begin to give you a going concern value; is that about what he told you?

A (by Mr. Fulford) That is in substance. There was one other reason, too.

Q The expense of going to other parks and looking at other parks?

A That is correct.

Q Right. What criteria did you use in coming up with your \$750,000 going concern value?

A On the improvements on the park?

Q Yes.

A Various conversations with people that last year came out to look at the park with the thought of having something to do with it.

Q How did —

A They are listed in the schedules. As a park, in relationship to what it costs if a corporation or an individual were to buy it, to operate it as a park, it is a real good value. If they don't want to operate it as a park, it is probably worth real estate and salvage." (T. III 388-89).

¹⁵Troy Browning, the experienced park operator who managed the park during the 1965 season for the trustee, told the court prior to the 1965 season that he would pay \$1,500,000 for it on his terms, which

(Continued on Page 14)

(b) Debt.

The trustee's estimate of total debt is \$1,244,569.96.¹⁶ However, this figure does not include liabilities or expenses for administration of this proceedings which according to the trustee may well amount to \$125,000 (T. III 378); it does not include any adjustment for the increase of interest on the appellants' mortgage from seven to eight per cent to which it became entitled two years ago when the mortgage went into default (T. III 376); it includes nothing for attorneys' fees for the foreclosing for appellants, which might be a substantial sum indeed (T. III 379-80); it does not include added charges on the other mortgages, the 1966 property taxes or the up to \$100,000 of Certificates No. 3 which the court has now authorized.

In short, the existing debts of this enterprise, based on the trustee's own figures, are now equal to or more than the total value of the property,¹⁷ taking the trustee's most optimistic estimate of that value. *If the trustee's most conservative estimate of value is followed, the debts now exceed all assets by approximately half a million dollars; and if the appellants' figures are followed, the debts exceed all assets by about \$850,000.*

called for very easy financing (T. II 67, 73-74). The offer was not repeated after the 1965 disaster. Robert Rice, a man who has been in the amusement park business many years and who was manager of Legend City during part of the pre-Chapter X period, estimated the value of the entire park at \$1,000,000, but did not offer to buy it (T. II 184).

¹⁶Trustee's balance sheet of December 31, 1965, Exhibit 8, Appendix E hereto.

¹⁷It is significant to note that, despite the money poured into Legend City by the trustee and his operator, Browning, during 1965, the value of the assets has not increased since December 31, 1964 (T. III 390-94). For comparison purposes, the balance sheet of Legend City on December 31, 1964, which is exhibit A, is attached to this brief as Appendix D. It, of course, reflects only book values of the assets, but the liabilities are all real. The balance sheet of December 31, 1965 (the latest available for the March hearings), which is Exhibit 8, is attached to this brief as Appendix E.

D. The Instant Proceedings.

As noted, in March of 1966, the trustee petitioned for issuance of a third certificate of indebtedness, this one to be \$100,000. The park having lost \$206,337.90 in the 1965 calendar year, the trustee now proposed to operate it for two additional years. He did not propose to pay any interest or any portion of the mortgage debt or property taxes with these funds or with the 1966 operating funds.

The trustee's petition for the certificate alleged that if this certificate were not authorized, the debtor would have to be adjudicated a bankrupt or the Chapter X proceedings would necessarily be dismissed (R.538). As is summarized in the Jurisdiction statement in the beginning of this brief, the appellants asked the court to adjudicate the debtor a bankrupt or to terminate the Chapter X proceedings and resisted altogether the issuance of the third certificate. Appellants' position was that whether the original orders had been right or wrong, the operating history of 1965 and the value testimony now available proved that Legend City is a hopeless endeavor. Appellants also moved for an order of sequestration of rents and profits from the operation of the business (R.585).

The hearing was held in late March, 1966 (T. III). The SEC supported the application for the certificate. It advocated that the question of whether the certificate should be given a priority over the secured debt of appellants should be reserved by the court to a later time (R.614). The court granted the trustee's petition and adopted the SEC's position concerning the postponement of determination as to what the priority of the \$100,000 third certificate should be. It ruled against appellants on all points.

This appeal followed.

SPECIFICATION OF ERRORS

1. The district court erred in not requiring the adjudication of the debtor a bankrupt, or in not requiring the dismissal of Chapter X proceedings, either on its own motion or in response to

appellants' pleadings, in view of the operating history and present financial circumstances of the debtor corporation as presented at the hearing on issuance of trustee's certificates.

2. The district court erred in authorizing the issuance of Certificates of Indebtedness No. 3 in view of the facts presented to the court at the hearing concerning the issuance and in view of the operating history and present financial circumstances of the debtor corporation.

3. The district court erred in not fixing the priority of the Certificates of Indebtedness No. 3 as subsequent and junior to the lien of appellants' security interest, and erred in reserving jurisdiction to fix that priority at a later date, since it has no jurisdiction to do so.

4. The district court erred in not protecting appellants' security interest in property of the debtor by not granting appellants' motion for sequestration of rents and profits, particularly in light of the testimony as to the operating history and present financial circumstances of the debtor corporation brought out at the hearing on appellants' motion.

SUMMARY OF ARGUMENT

During the most recent hearings in this Chapter X proceeding, the hearings on the trustee's application for issuance of Certificate of Indebtedness No. 3, the district court should have adjudicated the debtor corporation a bankrupt under Section 236, 11 U.S.C. Sec. 636, and directed liquidation. This determination should have been made by the court on the basis of the factual data before it—the history of operating losses prior to the institution of the Chapter X proceedings, which included a loss of \$138,795.33 during 1964 alone, an even greater loss in the trustee's operation of the park during 1965 of \$206,337.00, and the fact that the trustee was granted every form of relief which he thought desirable for the successful operation of the park during 1965, and still lost more money than had been lost in the preceding year. Furthermore, the debts of the debtor are sub-

stantially as great as the most optimistic valuation of its assets, and the secured debts alone are greater than any realistic value of the debtor's assets. The court should have adjudicated the debtor corporation a bankrupt and ordered its liquidation because the trustee has not yet, in a year and a half, been able to file a report proposing a plan of reorganization or explaining why such a plan cannot be proposed, and because in fact the total record before the court conclusively proves that no plan can be proposed, adopted and put into effect. Since reorganization is the heart and purpose of the corporate reorganization provisions of the Bankruptcy Act, reorganization proceedings should and must be terminated when it becomes apparent that reorganization is impossible.

The same facts which show that the debtor corporation should be adjudicated a bankrupt are even more clear in indicating that the Certificates of Indebtedness No. 3 were improperly authorized and issued. A certificate of indebtedness in a corporate reorganization proceeding which will, or could have, priority over secured indebtedness should be issued only when the funds raised by the sale of the certificate will be used to put assets into the business so that secured creditors will not lose their security. The only time certificates of this type can be sold to be used for working capital, which might become dissipated, is when the value of the assets is clearly in excess of the value of the security of the secured creditors—a situation which is manifestly not true here. The accumulation of certificates of indebtedness and real property taxes ahead of appellants' security has in the past and will in the future impair and endanger appellants' security in violation of the rule of absolute priority for senior creditors.

The priority of Certificates of Indebtedness No. 3 was not fixed by the court's order. The court attempted to retain jurisdiction to fix priority at a later date. This not only renders appellants' security interests unmarketable, since there is no way to fix what appellants own until the priority of these certificates is established, but shows that the court was and is concerned about the fact that the property of the debtor corporation is not sufficient to

adequately secure appellants' mortgage indebtedness and the new certificates. Any jurisdiction the court may have had to issue the certificates at all was such that the court was required to place the certificates in a priority position junior in right to appellants' security interest and the court could not reserve jurisdiction to place it ahead of appellants' security interest if it later develops that there is insufficient property available to satisfy both appellants' claims and those of the certificate holders.

Under these circumstances, appellants had a right to have their motion for sequestration of rents and profits granted. In addition to their mortgage lien, appellants have a security interest in the rents and profits of the debtor corporation, and the issuance of the certificates of indebtedness No. 3 was for the purpose of allowing the trustee to operate the debtor's business. If any rents and profits should accrue in 1966 (a circumstance quite unlikely in view of the trustee's past record of operations), and if those rents and profits are not sequestered, appellants lose a valuable portion of the security for which they originally bargained.

The totality of the court's orders appealed from here are such that the appellants, who are the senior secured creditors of the debtor corporation and therefore should be placed in a position of priority to recover from the debtor's assets, have instead been required to finance an operation of the trustee which was ill advised in its inception and disastrous in its consequences. The totality of the rulings of the court appealed from here inequitably and illegally continues that situation.

ARGUMENT

I. The Debtor Corporation Should be Adjudicated a Bankrupt Under Section 236 of the Bankruptcy Act and be Liquidated Accordingly.

The debtor corporation is hopelessly insolvent and its situation is rapidly deteriorating. The trial court erred in not adjudicating it a bankrupt.

Let us strip the matter to bedrock: here is a corporation, which

at the most optimistic present valuation as shown in the record, is worth \$1,650,000.00. Its hard liabilities, tangible, real and present, without any speculation at all, are substantially equal to this optimistic figure and are far higher than any realistic figure in the record. This unhappy enterprise is not merely flat broke, but it is continuing to go downward at the spectacular rate of the 1964 deficit of \$138,795.33 and a 1965 deficit of a lusty \$206,337.90.

Nobody ever saw such a sick cat get well. The optimistic estimate assumes that someone might buy this enterprise, despite its deficits, at a good high price. But in a year and a half of waiting for the first serious or tangible offer, nothing has turned up; and there is no rational basis at all to suppose that a generous Midas awaits around the corner. As noted in the statement of facts, the trustee and his 1965 operator had carte blanche from the district court to make something out of this park if they could. The trustee was relieved of the necessity of abiding by "sweetheart contracts" with lessees and concessionaires. These concession contracts must be reinstated to their original form during the 1966 operating season and the trustee will not legally have the benefit of more favorable terms during 1966. Moreover, the trustee had his choice of experienced operators and chose the one he wanted to test his theory that new management would cure the deficiencies of the park. Furthermore, the trustee had a blank check—he drew two certificates of indebtedness, putting them ahead of common creditors, a privilege which no normal operator would have.

Despite the fact that the trustee and his operator were freed of the burdensome concession contracts, despite the fact that the trustee had an idyllic power over the situation which no normal businessman could expect, he still lost over \$200,000 in the year 1965.

In summary, the trustee has taken a bad situation and turned it into a disaster. The book value of the assets, an item of doubt-

ful meaning in any event, has not increased noticeably in the year and a half since the trustee took over the park. The same assets have obviously depreciated in actual value during that period. The liabilities of the debtor, however, have been increased as a result of the trustee's 1965 operations, which resulted in a loss in excess of \$200,000. The liabilities have been further increased by the unknown amount of administrative expense not reflected on the debtor's books, plus attorneys' fees which will have to be allowed secured creditors, extra interest caused by the delay in foreclosure, and other such expenses. At the early stages of the Chapter X proceedings, the appellants, as secured creditors, objected to the continuation in Chapter X on the ground that their security was in danger. Much evidence was presented to support their position. The net result of the court rejecting that argument and evidence has been to put these secured creditors in even greater jeopardy.

Significantly, there has never been a report by the trustee as to the results of his investigation of the property, liabilities, and financial condition of the debtor, whether the continuance of its business is desirable, or even if the debtor is solvent or insolvent as those terms are defined and used in Chapter X of the Bankruptcy Act. Apparently the trustee is planning to wait to make such a report to the court until at least one more full operating season has passed. Perhaps he is waiting for the 1967 season to pass as well. However, with the record that has been made, the court does not need the delivery of the Section 167, 11 U.S.C. Sec. 567, report to answer the question. The debtor corporation is hopelessly insolvent and there is no chance whatever that the trustee can reduce the insolvency to any significant degree, or propose a plan of reorganization that can keep the business alive.

The Chapter X court in this situation should terminate the proceedings and adjudicate the debtor a bankrupt. The district court should not grant further time for the proposal of a plan of reorganization if there is no immediate prospect that the debtor or the trustee can devise an acceptable plan, especially if a year

and a half has elapsed since filing the original Chapter X petition. See *John Hancock Mut. Life Ins. Co. v. Casey*, 141 F.2d 104 (1st Cir. 1944), *cert. denied*, 323 U.S. 713, 65 Sup. Ct. 39, 89 L. Ed. 574 (1944). The Court stated:

" . . . If the petition has been approved [under Section 144; 11 U.S.C. Sec. 544] and it later becomes evident to the judge that there is no reasonable prospect of effecting a plan of reorganization, it then becomes his duty to terminate the Chapter X proceedings, pursuant to § 236," 141 F.2d at 107.

This is precisely the situation we have here. There simply is no possibility of the trustee or anyone else working out a practical and equitable plan of reorganization for this debtor. Not even the secured debts can be supported and eventually paid by the continued operation of the business, and under no event could there be anything at all for unsecured creditors and stockholders. This is so even without reference to the fact that the mortgage holder-appellants will not consent to any alteration or modification or change in their rights. In this matter, such consent would be necessary for any plan to be put into effect. Section 179 of the Bankruptcy Act, 11 U.S.C. Sec. 579; *Leas v. Courtney Co.*, 261 F.2d 13 (4th Cir. 1958); *Arey & Russell Lumber Co. v. American Nat'l Bank & Trust Co.*, 201 F.2d 508 (4th Cir. 1953). Not only is there no possibility of working out a practicable and equitable plan in this case, but also expenses are accumulating, the value of the debtor's assets is shrinking, and the total liabilities are increasing. All these factors justify the reorganization court adjudicating the debtor corporation a bankrupt, despite the fact that the debtor corporation and its stockholders still want reorganization. *Eddy Shipbuilding Corp. v. Bay Trust Co.*, 168 F.2d 993 (6th Cir. 1948).

In a situation such as this, a reorganization cannot possibly be feasible since it involves a greater debt than the property can support. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 91 F.2d 827 (4th Cir. 1937):

"However honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog its docket with visionary or impractical schemes for resuscitation." 91 F.2d at 831.

Similar fact situations existed in *Oakland Hotel Co. v. Crocker First Nat'l Bank*, 85 F.2d 959 (9th Cir. 1936), and *In re Cosmopolitan Hotel, Inc.*, 85 F.2d 851 (10th Cir. 1936). In each of these proceedings, a hotel went into Chapter X and was operated by a receiver or a trustee at a loss during the pendency of the proceedings. The secured creditors would not consent to any plan which would jeopardize, eliminate or change their security interest and it did not appear that any angel would come forth with sufficient funds to purchase the secured creditors' interest. In each case, the dismissal of the petition under former Section 77B was held to be proper since no relief of the kind contemplated by Chapter X was possible. In this case the present posture of the Chapter X is such that adjudication and liquidation is clearly called for.

We appreciate that the Securities and Exchange Commission disagrees with us and has supported the position taken by the district court on this matter. While the Commission is respected, it is of course not sacrosanct. The Commission, in its role of an amicus adviser to the court, 6A *Collier, Bankruptcy*, ¶ 9.27 (14th ed. 1965) is supposed to advise the court from the broad point of view of the public interest and the general interest of investors. *Ibid.* Given these facts, this case must be regarded as a failure on the part of the Commission properly to advise. We think particularly unsound, and with an unsoundness which permeates its entire role in this matter, its recommendation concerning the sale of the third certificate of indebtedness without determining what the rights of the purchasers of that certificate would be. We shall develop that matter more precisely in its place, and pass it here only with the observation that the Commission has offered no specific facts to warrant the conclusions which it recommends.

The facts brought out in the various hearings on this matter

and the law as it is presented in this brief and as has been presented to the district court show that the debtor corporation should be declared a bankrupt, should be liquidated and, most important, should not be operated under a Chapter X trusteeship.

This is particularly true because the purpose of a reorganization proceeding is to reorganize, and there never has been and is not now any possibility of a successful reorganization plan being consummated.

Central to the purpose of Chapter X of the Bankruptcy Act is the necessity that a plan or reorganization be proposed and adopted. Section 146, 11 U.S.C. Sec. 546, provides that a petition filed under Chapter X may be dismissed even before a hearing if it is unreasonable to expect that a plan or reorganization can ultimately be effected. *Arey & Russell Lumber Co. v. American Nat'l Bank & Trust Co.*, 201 F.2d 508 (4th Cir. 1953). Section 167(6), 11 U.S.C. Sec. 567(6), requires the trustee to give notice to the creditors and stockholders so that they may, if they wish, submit suggestions for the formation of a plan within a time therein named. Section 169, 11 U.S.C. Sec. 569, provides that the judge *must* fix a time within which the trustee shall prepare and file a plan or a report of his reasons why a plan cannot be effected and must fix a time for a hearing on such a plan. Section 170, 11 U.S.C. Sec. 570, provides that other affected persons may also promulgate plans. If no plan is proposed or approved or if a confirmed plan is not consummated, the court must dispose of the proceedings under Section 236, 11 U.S.C. Sec. 636.

It is true that the district court has a certain amount of discretion and time leeway in determining whether or not a plan of reorganization can, in fact, be proposed, approved and ultimately consummated. Even the fact that a class of secured creditors announces in advance that it will not agree to a reorganization plan does not, in and of itself, make it impossible for a Chapter X reorganization petition to be filed in good faith, as

the term is used in Section 146, 11 U.S.C. Sec. 546. *York v. Florida So. Corp.*, 310 F.2d 109 (5th Cir. 1962), *cert. denied*, 372 U.S. 943, 83 Sup. Ct. 936, 9 L. Ed. 2d 968 (1963). This is the case even though it is necessary for creditors holding two-thirds of the claims filed and allowed by each class to approve the plan before it can be confirmed by the court. Section 179, 11 U.S.C. Sec. 579. A comparison of *York v. Florida So. Corp.*, *supra*, with *Arey & Russell Lumber Co. v. American Nat'l Bank & Trust Co.*, *supra*, *Leas v. Courtney Co.*, 261 F.2d 13 (4th Cir. 1958), and *Janaf Shopping Center, Inc. v. Chase Manhattan Bank*, 282 F.2d 211 (4th Cir. 1960), establishes a set of guide lines for the Reorganization Court in its initial determination whether or not a plan of reorganization is feasible.

If it is impossible for a plan of reorganization to be formulated and carried out without the consent of the secured creditors, and if the secured creditors announce in advance that they will oppose any plan of reorganization which modifies their rights in any particular, the petition is not filed in good faith because a plan of reorganization simply cannot be effected. (*Arey & Russell*, *Leas*, *Janaf*.) A typical situation where this might occur would be where a single secured creditor holds mortgages securing the entire debtor corporation's property, and where that property is worth less than the amount of the indebtedness to that creditor. However, if the property owned by the debtor corporation is worth substantially more than the secured indebtedness, it might be possible to formulate a plan in which the secured indebtedness could be entirely paid off and the business remain in operation. In such a case, the opposition of the secured creditor or creditors to the plan would not be determinative, at least in the initial stages. (*York*)

The initial petition in this case, however, shows that the situation presented to the court below was not within the guide lines of *York v. Florida So. Corp.*, *supra*. The petition stated:

"The rights of secured creditors must be altered or modified by the issuance of other securities and the cancellation or

modification of their liens or otherwise. All such secured creditors will not consent to an alteration or modification of their rights. As part of the reorganization, the secured debts, the capital structure or the rights of stockholders must be changed and altered." (R.4-5)

Not only is it now abundantly clear that it is and will be impossible to formulate a plan for Legend City, Inc., in which the secured indebtedness can be paid off and the business remain in operation, it was so apparent at the time of the original filing that it was included in the debtor's petition for reorganization. Therefore, under the authority of *Arey & Russell, Leas*, and *Janaſ, supra*, the petition showed on its face that it was not filed in good faith and should have been dismissed at the first instance. Since the secured creditors do not consent to an alteration of their rights, they must be paid off or given "a substitute of the most indubitable value." *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1955). This is clearly impossible.

Furthermore, beginning with the court's initial order of approval, it quickly became apparent that the debtor's petition was erroneous in part because the valuation alleged in the petition was completely out of proportion to the actual value of the assets. On January 19, 1965, eight days after the district court entered its initial order approving the petition of the debtor, and the same day that the appellants entered their appearance in the proceedings by filing the statement of attorneys pursuant to Section 210, 11 U.S.C. Sec. 610, the appellants, in a motion to dismiss the petition, stated that:

"The mortgagees will not give their consent to any plan of reorganization which in any way modifies or alters their rights. Since, as is stated in the petition, any plan of reorganization must modify or alter their rights, there cannot be a successful plan of reorganization in this case and the petition must be dismissed since it was not filed in good faith."

Argument was held February 1, 1965 on the motion to dismiss. The burden of proof as to good faith in filing was on the petitioner-debtor corporation. *Marine Harbor Properties, Inc. v.*

Manufacturers Trust Co., 317 U.S. 78, 63 Sup. Ct. 93, 87 L. Ed. 64 (1942); *Grubbs v. Pettit*, 282 F.2d 557 (2d Cir. 1960); *In re St. Charles Hotel Co.*, 60 F. Supp. 322 (D.N.J. 1945), *aff'd*, 149 F.2d 645 (3d Cir. 1945), *cert. denied sub nom.*, *Ladin v. Hurwith*, 326 U.S. 738, 66 Sup. Ct. 48, 90 L. Ed. 440 (1945). Nonetheless, petitioner-debtor did nothing more than rely on the book value of the assets which has been presented in its Section 128, 11 U.S.C. Sec. 528, petition. The district court required nothing more. Had the debtor corporation, in fact, been worth \$2,000,000 more than the total of its liabilities, surely there would have been no need for a Chapter X proceedings. Nonetheless, the district court exercised its discretion and denied the motion to dismiss made by appellants.

In its pleadings, the debtor corporation had admitted that if, after a petition had been approved, it later became apparent to the district court that there was no reasonable prospect of effecting a plan of reorganization, it then became the court's duty to terminate the Chapter X proceedings (R.58). *John Hancock Mut. Life Ins. Co. v. Casey*, 141 F.2d 104 (1st Cir. 1944), *cert. denied*, 323 U.S. 713, 65 Sup. Ct. 39, 89 L. Ed. 574 (1944). Evidence of this kind was presented to the court at the time of the hearing of February 15, 1965, on the petition of the trustee for an order of the court authorizing him to issue his first certificate of indebtedness. It was abundantly clear at that time that the opposition of appellants to having their rights modified was sufficient under the cases cited earlier in this brief to negate any finding of a plan being feasible. It was clear at that time that it would be impossible to formulate or to get approval of a plan of reorganization in accordance with the provisions of Chapter X.

Even if the district court properly exercised its discretion in not dismissing the debtor's petition at that point, however, it thereafter became apparent that no plan of reorganization would be forthcoming, and that the trustee was merely using the reorganization provisions of the Bankruptcy Act to get a free ride at the expense of the secured creditors. One of the keystones of

Chapter X is the requirement that the trustee file a proposed plan for corporate reorganization. Indeed, it is toward that plan that the entire Chapter X proceedings are directed. It is a requirement of the Act that such a plan be presented within the soonest possible time, or, at the very least, that the trustee report to the court valid reasons why such plan cannot be formulated until a later date. Section 169, 11 U.S.C. Sec. 569. The court, in its initial order approving the petition, had set 60 days from the date of that order (which was later extended until April 1, 1965) as a reasonable time within which the trustee should prepare and file a plan or a report of his reasons why the plan could not be filed. The trustee then moved the court on March 22, 1965, for an order extending the time for proposing that plan to "the earliest date practicable."

This motion for an extension was filed immediately after the full hearing under Section 144, 11 U.S.C. Sec. 544, in which the court had just determined that the petition had been filed in good faith. In other words, evidence was presented to the court on March 5 and 19, 1965, that it was reasonable to expect that a plan of reorganization could be formulated and presented to the court in accordance with the provisions of Chapter X. Then, three days later, on March 22, 1965, the trustee came back to court stating that he could not prepare such a plan within the reasonable time ordered by the court. Even more significant, *such a proposed plan of reorganization has still not been presented, even though it is now well over a year later.* A year and a half from the date of filing of the original petition is not the "earliest practicable time," even under the terms of the court order extending time for filing a plan. After a year and a half, it becomes clear that the instant Chapter X proceedings are being used, and have been used from inception, as a mere "nursing receivership"—a use which has been condemned by the United States Supreme Court. *Continental Ill. Bank & Trust Co. v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648, 55 Sup. Ct. 595, 79 L. Ed. 1110 (1935). Similarly, the Seventh Circuit has stated:

"If plans are not forthcoming with reasonable promptness, relief will be granted appellants. This bankruptcy proceeding contemplates a plan of reorganization. *This must be undertaken expeditiously and proceeded with diligently. Such proceedings must never be viewed as nursing receiverships.* The two sections, 74 and 77, (11 U.S.C.A. § 202, 205) [Now included within Chapter X] are not to be used to delay, but to facilitate reorganizations of properties that are over-capitalized or whose capital structure is unfortunate. There is no basis for appellants to assume the court will not insist on the consummation of these ends." (Italics in the original.) *In Re Util. Power & Light Corp.*, 91 F.2d 598, 602 (7th Cir. 1937), *cert. denied*, 302 U.S. 742, 58 Sup. Ct. 144, 82 L. Ed. 573 (1937).

This authority was reaffirmed as to Chapter X proceedings in *In Re Burton Coal Co.*, 57 F. Supp. 361 (N.D. Ill. 1944) and *In Re McGann Mfg. Co.*, 190 F.2d 845 (3d Cir. 1951).

The passage of over a year and a half without trustee presentation of either a plan or of reasons why a plan cannot be effected, the continued deterioration of assets in which appellants have a security interest, the continued increase in liabilities, and, significantly, the vast increase in Chapter X administrative debt, the continued eroding of the position of the secured creditors, the continuing reaffirmation of the position of the secured creditors that they will not consent to any plan which would change their rights, the continued history of losses in operation, even under supposedly sound and experienced management and without the "sweetheart contracts," and the necessity of reinstating the "sweetheart contracts," if there is to be continued operation, all make it clear that the Chapter X proceedings which should not have been properly termed in good faith at their inception, have now degenerated into actual bad faith. The only part of the Bankruptcy Act which could possibly be applicable to this proceedings at this point is Section 236(2), 11 U.S.C. Sec. 636(2), which requires an order adjudicating the debtor a bankrupt or dismissing the proceeding. It is hard to conceive of a fact situation where feasibility of reorganization being effected is so lacking. The court

below will be fortunate, indeed, if there is sufficient estate for liquidation to repay the certificates of indebtedness which have been issued, let alone the administrative debt being incurred.

II. None of the Certificates of Indebtedness were Properly Issued in this Matter; Certainly No. 3 Was Not.

If we are right in the argument previously made, then, far from authorizing the certificate of indebtedness, the court should have put the debtor into bankruptcy. It not only did not do so but authorized a third certificate of indebtedness for \$100,000, and that authorization is expressly challenged on this appeal. We incorporate by reference all that has been said going to the question of adjudication in bankruptcy; at a minimum, that same evidence and those same considerations forbid the third certificate.

There have been three separate orders of the district court authorizing trustee's certificates of indebtedness which may ultimately total \$160,000 (R.100, 139, 640). This appeal is from the last of those orders, authorizing \$100,000. Furthermore, there are unpaid real estate taxes, which by the orders of the district court, have priority ahead of Certificates of Indebtedness No. 1 (R.100). Under Arizona law those taxes are ahead of appellants' mortgage. *Ariz. Rev. Stat. Ann.* Sec. 42-312 (1956). Those taxes delinquent and due, currently amount to approximately \$57,000 (T. III 286, 377). At this point, therefore, over \$150,000 of claims could be placed ahead of the mortgage held by appellants, not counting the true administrative expenses which according to the trustee should amount to another \$125,000 (T. III 378). In its April 15 order the court below specifically rejected the notion that the administrative debt should be subordinated to the new certificates.

Certificates Nos. 1 and 2, for \$10,000 and \$50,000 respectively, have been issued, the money has long since been spent, the certificates have not been repaid, nor is there any money available to the Trustee from which payment can be made. The order authorizing the issuance of Certificate of Indebtedness No. 3, for \$100,000 is one of the orders appealed from here.

Unlike the preceding orders in which the sale of the certificate is made in a unit to a financial institution or an operator if it wishes to buy, the third certificate of indebtedness is in fact a plural certificate. By its terms it expressly contemplates a series of certificates which can be sold for as little as \$10. It expressly contemplates that solicitation for this purpose shall be made among the existing stockholders and creditors of the debtor.¹⁸

Moreover, it is not settled what the priority of these certificates is to be. At the recommendation of the Securities and Exchange Commission, the question of whether these certificates shall be prior to the outstanding secured debt of the corporation or whether they shall take their place at the foot of the line is expressly reserved.¹⁹

¹⁸The relevant passages of the order are:

"ORDERED that Certificate of Indebtedness No. 3 may be issued serially in amounts not to exceed the total sum of One Hundred Thousand Dollars (\$100,000.00) provided, however, that no single certificate shall be issued as a part thereof in an amount less than Ten Dollars (\$10.00); and it is further . . .

ORDERED that in the sale of said certificates, solicitation shall be limited to stockholders, unsecured creditors and secured creditors; provided, that any other persons may purchase said certificates without solicitation. . . ." (R.640, 643-44)

¹⁹The Court's order provides:

"ORDERED that if there be no such income or if such income is insufficient to repay said Certificate of Indebtedness No. 3, then said certificate of indebtedness shall be paid as a cost and expense of administration and a liability of the Trustee out of the unencumbered or free assets of LEGEND CITY, INC., provided, however, that the above-entitled Court reserves jurisdiction to determine upon proper notice and hearing to what extent, if any, said certificate of indebtedness shall be accorded a lien status prior to the mortgage or lien of secured creditors of LEGEND CITY, INC." (R.641).

The SEC had filed a memorandum advising the Court that:

". . . the Court should reserve jurisdiction to determine at a later date the extent to which, if at all, the trustee's certificates should be given any priority over the secured creditors of the debtor corporation. There is no need to resolve this issue at this time. In a proper case, it has been held that the Court would be justified, should reorganization fail, in charging certain expenses of the aborted proceeding against secured assets,

(Continued on Page 30)

The order, in short, creates a sort of financial double jeopardy for everyone involved. The original investors, having lost their shirts, are now given the opportunity under the imprimatur of a federal district court to divest themselves of another garment as well; while if the poor original creditors, whose only offense is that they advanced several hundred thousands of dollars on the note and mortgage, should now wish to try to sell that obligation, neither they nor their purchaser would know whether this third certificate comes before or after their securities.

When the court under Sec. 116(2), 11 U.S.C. 516(2), authorizes certificates of indebtedness, it exercises a broad grant of power which must be exercised cautiously. The court may only "upon cause shown" authorize a trustee to issue Certificates of Indebtedness, ". . . upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable."

As stated in the leading case:

"The exercise of the power to authorize the issuance of trustee's certificates and to supplant the existing first mortgage calls for careful, cautious and considerate action by the

when the free or unencumbered assets are insufficient. *First Western Savings & Loan Ass'n v. Anderson*, 252 F.2d 544 (C.A. 9, 1958); *In re Alaska Plywood Corp.*, 166 F. Supp. 423 (D.C. Alaska, 1958). The rights of the certificate holders as a cost and expense of administration vis-a-vis the secured creditors under the above-cited authority should be determined along with other costs and expenses of administration if and when the issue should arise.

Accordingly, the Commission makes no objection to the proposed financing. The suggested priority status is, we believe, 'equitable' under the circumstances as provided in Section 116(2) of Chapter X." (R.634).

It is no great wonder that the SEC makes no objection to the proposed financing. Neither the SEC nor the stockholders are underwriting it. If the new certificates are given priority over the appellants' security, however, the appellants will be underwriting the financing and sustaining the losses which are surely to come from the operation of the park. This matter is discussed at Section III of this brief.

court. Such power should not be abused by an unwise exercise of discretion. . . . If the Court does not so approach the question, but acts merely on hopes unsupported by facts, its order 'in the particular case' will not be 'lawful' [the statute now reads 'equitable' instead of 'lawful']. On appeal it will be reversed." *In Re Prima Co.*, 88 F.2d 785, 790 (7th Cir. 1937).

The *Prima Co.* case involved a corporation which had much perishable property which would have been lost if liquidation occurred. The reorganization court had authorized Trustee's Certificates of Indebtedness equalling less than three quarters of one per cent of the value of the debtor's property. The known losses on liquidation would have been three times the value of the certificates issued. The court found the authorization of the issuance of the certificates to be valid.

How different that fact situation was! The Court below is not dealing with the problem of authorizing trustee's certificates for a certain amount of money in order to preserve property worth far more money and which otherwise would be lost, but after the trustee's certificates are issued surely will be saved. Here, the total amount of trustee's certificates amount to from 10 to 30 per cent of the value of the estate, depending on the appraisal. Issuance of the third certificates surely is an act "merely on hopes unsupported by facts." As the Supreme Court of Washington once said, referring to mining operations near a ghost town,

"Like the town of Bolster they have no present but live in the memories of the past and in hope for the future, and the future is based upon visions too remote for the law to recognize." *Thorp v. McBride*, 75 Wash. 466, 135 Pac. 228, 229 (1913).

Like the town of Bolster, any hopes of the trustee and the stockholders for the future of Legend City are based upon visions too remote for the Bankruptcy Act to recognize.

The statute, Section 116(2), 11 U.S.C. Sec. 516(2), requires the trustee to show cause for the issuance of certificates. However,

at the time that Certificate of Indebtedness No. 1 for \$10,000 was authorized, before the Trustee first reopened the amusement park, there was not sufficient cause shown to warrant the issuance of a Trustee's certificate that would in any way impair appellants' security. With regard to Trustee's Certificate of Indebtedness No. 3, appellants have not only rebutted the trustee's attempted showing of cause for its issuance, but have also affirmatively proved that no Trustee's Certificates of Indebtedness should be issued of any kind or priority.

At the time Certificate of Indebtedness No. 1 was authorized, the situation in which the debtor corporation found itself was much like the situation of the parties in *In re Prima Co.*:

"In brief, it must be apparent that where a debtor in financial straits, hard pressed to keep its head above water, goes into a court of bankruptcy to reorganize, it is natural and quite likely that the creditors will be aligned into two sharply divided camps. One group represents the unsecured creditors and the stockholders. They have nothing to lose by a continuation of the business. Opposed to this group is a second, composed of the secured creditors who insist upon the immediate realization of their claims. The first class visions nothing but a rosy future with all debts ultimately paid and the stockholders in full possession of their property, with management unvexed by creditors' supervision and unembarrassed by unsolicited creditor advice, enjoying substantial dividends which are the just reward of keen foresight and great courage. The secured creditor, on the other hand, is apt to fear much and to have gloomy forebodings of a dismal future, darkened by shadows of the unforeseen. The plan this group advocates may be and often is selfish, but the secured creditor can consistently and stoutly assert that he did not invest his money as a speculation, as did the stockholders and some of the unsecured creditors. If he over-stresses his rights, belittles the existence and value of the equities, and if his position seems somewhat unfair, as well as unsympathetic, in view of the total assets compared to the small amount of the mortgage indebtedness, the court should nevertheless never take any serious chance of impairing his

security to merely postpone the evil day to unsecured creditors and stockholders. If the court does not so approach the question, but acts merely on hopes unsupported by facts, its order 'in the particular case' will not be 'lawful.' On appeal, it will be reversed." *In Re Prima Co.*, 88 F.2d at 790.

Assuming for the sake of argument that the district court was originally acting within its discretion to allow the stockholders and unsecured creditors to attempt to realize the rosy future which they envisioned, it is now clear that the gloomy predictions of the secured creditors were far more accurate appraisals of the park's future.

The secured creditors claimed their security was in danger in the first pleading they filed (R.27) and have continued to do so ever since. They were met, however, by the trustee's assertions that all that was necessary to run the park at a profit and provide money for everyone was:

1. An experienced park operator of his choice to operate the park.
2. Installation of sound management practices and procedures.
3. Adjustments on percentages to be received from concessionaires.

The district court authorized the trustee to obtain, and he did obtain:

1. An experienced park operator of his choice to operate the park.
2. Installation of sound management practices and procedures.
3. Adjustments on percentages to be received from concessionaires.

Even so, the trustee's estimates of profit to be made by operating the park were in error by a quarter of a million dollars (T. III, 170-171), and the park's deficit grew \$206,000 in one calendar

year (T. III, Exhibit 8). It has continued to grow since December 31, 1965.

Even if the district court were justified in 1965 in taking the serious chance of impairing the security interest of the secured creditors (and a very serious chance indeed was taken, as is evidenced by the financial analysis of the corporation earlier in this brief) the court cannot do so again. The only really competent evidence of value of the debtor's property is the professional M.A.I. appraisal showing the land valued at \$450,000 (T. I 79) and the Trustee's estimate that on liquidation, the personal property is worth no more than \$250,000 to \$300,000. (T. III 383). This is the estimate of value closest to true value. The estimate of "going concern value" in the record is baseless in fact and is not an estimate by a qualified expert. See the statement of facts, footnote 14, for the exact basis on which that estimate was given. Considering the history of operating losses of this business, there can be no going concern value — it is not a going concern. The security is therefore not worth as much as the overall indebtedness to appellants which is secured by that property. By issuing Certificates of Indebtedness Nos. 1 and 2 the court was taking a serious chance of impairing appellants' security. By authorizing the issuance of Certificate of Indebtedness No. 3 the court is unquestionably destroying the security of the appellants. This the court cannot do.

The entire philosophy of Chapter X is that the secured creditors are to realize the full amount of their liens before anyone else can realize anything from either the reorganization or the liquidation. This is aptly called the rule of absolute priority. Senior claimants are entitled to full compensatory treatment for the rights they possess before anything may be allocated to any junior interests. They must get the "indubitable equivalent" of their security. This principle was first developed in railway reorganizations, *Northern Pac. Ry. v. Boyd*, 228 U.S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931 (1913), but is fully applicable to this type of proceeding. *Consolidated Rock Prod. Co. v. DuBois*, 312 U.S. 510, 61 Sup. Ct.

675, 85 L. Ed. 982 (1941). Since in successful reorganizations, where a plan is finally entered into and carried out, the plan must provide for payment of secured creditors or for an indubitable equivalent to payment, it is all the more clear that the secured creditors must get the security they received when the reorganization fails and that is all with which they are left.

There are further requirements for the issuance of Trustee's Certificates of Indebtedness which also have not been met with respect to any of the certificates authorized by the district court and particularly the new class authorized. There must be a high degree of likelihood that the debtor can be reorganized by a feasible as well as a fair and equitable plan in accordance with the act within a reasonable time, and there must be a high degree of likelihood that the secured creditors will not have their security injured by this procedure. *In Re Third Ave. Transit Corp.*, 198 F.2d 703 (2d Cir. 1952). It is inconceivable that the court could have found as a fact, based upon the entire record before it and the hearings held in March, 1966, a "high degree of likelihood" either that the debtor could be successfully reorganized quickly or that the secured creditors would not have their security injured by this procedure. The 1965 operating history of the trustee could only lead to the opposite conclusion that reorganization of the debtor is impossible.

The *Third Ave. Transit Corp.* case did not directly concern Trustee's Certificates. It involved a Trustee's request for possession of property in the hands of the mortgagee. The two proceedings are analogous, however, and their effect is the same when there is not or may be not sufficient property to satisfy the debtor's secured debts.

"The first mortgage bond holders should not have had their security put at risk in order to increase the 'elusive equity' of the junior creditors or stockholders, for those junior interests possess no right to a 'run for other people's money.' To direct enforced lending of the sort ordered here may yield these undesirable results: (a) The zeal of the reorganization

trustees to make only the most prudent expenditures may be blunted. (b) There may well be undue delay of what may be inevitable liquidation. (c) The judge loses the opportunity to learn, in a significant way, the detached attitude of the commercial world toward the value of the assets." *In Re Third Ave. Transit Corp.*, 198 F.2d at 707.

The *Third Ave. Transit Corp.* case also imposes a requirement that the Trustee show that the secured creditors will not be injured by the issuance of the Trustee's Certificates of Indebtedness. This, as has been elaborated elsewhere, the Trustee has not shown.

The third possible undesirable result stated in the *Third Ave. Transit* case is significant here. The reaction of the commercial world to the possible marketing of evidences of indebtedness can be of great help to the court in analyzing the financial position in which the debtor finds itself. As the court stated in the *Third Ave. Transit* case:

"Indeed, if, in the ordinary market, funds can be procured only on severe terms, that fact will often throw light on the likelihood of reorganization. . . ." 198 F.2d at 706, footnote 9.

The detached attitude of the commercial world is most significant in the case of Legend City, and, in fact, considerable testimony was given about that attitude at the hearing in March, 1966. The trustee testified that he, as was the case with the debtor's management which preceded him, was rebuffed by every sophisticated lender that he approached for financing. (T. III 394). He talked to eastern banks, the Small Business Administration and several western banks. (T. III 394-395). Instead, it was necessary for the trustee, in order to raise any money, to borrow it in small amounts from the stockholders and unsecured creditors, whom even the trustee terms unsophisticated lenders. Not being able to convince any normal lender, the trustee turned to the people least able to protect themselves. The Securities and Exchange Commission, which has appeared in these proceedings supposedly to protect the public investors, indicated throughout the hearing that it would require full disclosure to the would-be

purchasers of Certificate of Indebtedness No. 3 and along that line, required a number of changes in the proposed disclosure of the trustee. Appellants find the notion that so-called disclosure is really going to protect these unsophisticated lenders nothing more than fantasy. The SEC is a participant in these proceedings because of Sections 161, 11 U.S.C. Sec. 561, and 208, 11 U.S.C. Sec. 608. The position of the Commission is supposed to be to protect the stockholders, and the only way to protect those stockholders who have been foolish enough to buy the trustee's certificates is to attempt to give them priority over appellants' mortgage. Sympathy notwithstanding, this is a possibility that appellants cannot allow and that no court should permit.

Throughout these proceedings, much has been made of the fact that the debtor corporation has many small shareholders whose investments should be preserved if at all possible. In this respect, counsel for the debtor and the trustee and the shareholders committee seem to equate this private corporation, founded to make a profit and subject to known market risks, with a quasi-public utility status. This has no bearing on appellants' legal rights to repayment or, in the alternative, to their contracted-for security. But even if this somehow does have relevance, it is not conclusive of the issue. A true public utility was the debtor in *In re Third Ave. Transit Corp.*, *supra*, yet the Second Circuit stated:

"As the debtor is a public utility, the judge properly took into account the factor of the public interest in the debtor's continued operations. That, however, is but one factor; it must not be allowed to outweigh all others. There are strict limits to the extent to which, in reorganization proceedings, the interests of creditors (or of a particular class of creditors) may be sacrificed to the public interest; to exceed those limits is (to say the least) to come dangerously close to the edge of unconstitutional taking of property, a line from which courts should keep away if possible." *In re Third Ave. Transit Corp.*, 198 F.2d at 707.

This Court should reverse the court below and direct the return

of any impounded funds remaining from the sale of the new certificates to the certificate purchasers pro rata.

III. The Court Cannot at Some Later Time Determine the Priority of Certificate No. 3.

Whether or not it was reversible error for the district court to authorize the issuance of Certificate of Indebtedness No. 3, it is nonetheless a fact that as of May 18, 1966, at least \$35,000 of these certificates have been sold by the Trustee to unsophisticated (and undoubtedly unsuspecting) public stockholders of the debtor. As a practical matter, therefore, some arrangement must be made for the method of their repayment if, at the time of repayment, there are sufficient assets to do so. The district court, however, has not done this. It has reserved jurisdiction or attempted to do so in the April 14, 1966 order here appealed from, ". . . to determine upon proper notice and hearing to what extent, if any, said Certificate of Indebtedness shall be accorded a lien status prior to the mortgage or lien of secured creditors of Legend City, Inc." This device of approach is totally lacking in authority or support. *First Western Sav. & Loan Ass'n v. Anderson*, 252 F.2d 544 (9th Cir. 1958), cited by the SEC to the court below (see footnote 19, *supra*) will not tolerate such an interpretation. The unsophisticated purchasers deserve better treatment if in fact disclosure means anything. In addition, the appellants have a right to know more.

Elsewhere in this brief, it is established that the issuance of these certificates of indebtedness was error and also that it is error for the court to allow the trustee to continue operating the debtor's business. The fundamental reason for this is that the security of the appellants is being endangered by these courses of action. These same principles, therefore, show that the new Certificates of Indebtedness, when issued, should not further impair the security of the secured creditors and that it is an abuse of whatever discretion the district court may have had to allow them to do so. Since it is an abuse of discretion for the court to issue these certificates because their existence may impair appellants' security, the court cannot allow those Certificates which

were erroneously issued to directly impair the security. Even if this Court should find that the certificates were not improperly issued, nonetheless it is still the law that they cannot directly impair appellants' security at this time, and therefore must be placed in priority and right in liquidation or reorganization after the note and mortgage of appellants.

The net effect of the court's reserving or attempting to reserve jurisdiction to set the priority of these certificates is twofold. It places the mortgagees (the appellants) in the position of not knowing exactly what it is that they own. For example, if appellants were to secure a buyer for their mortgage interest (and their mortgagees' interest in the property is certainly a marketable item, even though the market is not good) they could not accurately inform a prospective buyer what it is they have to sell. The value of appellants' security would be greatly altered if there was another \$100,000 ahead of them in priority, particularly since the value of the real and personal property securing the note is apparently not sufficient to pay off the property taxes and the Certificate of Indebtedness now purportedly ahead of appellants and to pay off appellants as well. The Court's ruling, therefore, makes property and rights of the appellants, which certainly should have some present value, worthless. They will have value only when the priority of the new certificates is ultimately determined and an accurate assessment can be made of value.

The fact that the district court has reserved jurisdiction to set the priority of these certificates in and of itself shows under these circumstances that its order of April 14, 1966 was erroneous. There is only one situation in which the priority position of Certificate of Indebtedness No. 3 would be significant — that is, the situation in which the value of the debtor's property is insufficient to pay off those obligations now ahead of the secured creditors, the secured creditors and the Certificate of Indebtedness No. 3. The fact that the court reserved jurisdiction to set the priority, or attempted to do so, in and of itself shows that the reorganization court is concerned that perhaps the debtor's prop-

erty may not be worth enough to pay off these three classes. The court has tacitly said it concurs with what appellants have been saying all along. If the court is concerned about this fact, the rule of absolute priority as well as the principles set forth in the other cases cited in this brief clearly show that the certificates should not have been issued in the first place and that, if issued, they *must* be put in a priority position after and junior to the appellants' mortgage. If there is not enough debtor property to insure the payment of all three classes, placing Certificate of Indebtedness No. 3 ahead of the appellants' mortgage would be directly contrary to the rule of *Northern Pac. Ry. v. Boyd, supra*, and to the principles and philosophy of Chapter X.

This situation is further aggravated by the fact that the \$100,000 to be raised in this manner is to be used for working capital for the trustee's 1966 operation. The professional operator the trustee had thought imperative is long gone. The trustee once admitted he is not qualified to run the amusement park, and yet that is exactly what is happening in the summer of 1966. The trustee's contract with the former operator, T. H. Browning & Associates, expressly provides that "the operation of a park is a specialized business requiring the assistance by the trustee of experienced operators of this type of business . . ." (R.148).

The court below did not and could not suppose that the trustee, Mr. Fulford, was an expert in operating an amusement park. Not only did he so acknowledge at T. III 164, but after an exchange on this point, the court observed:

"The Court: He may be an expert trustee.

"Mr. McGarry: I would concede that Mr. Fulford is an expert trustee, but he is no expert in the amusement park business, Your Honor, as he just conceded.

"The Court: Well, I think we all understand that." (T. III, 164).

The trustee is not an expert on the condition and safety of amusement park rides. He is not an expert on the consequences of labor disputes to amusement park attendance although he

blames much of the decrease in attendance at Legend City during 1965 on this cause (T. III 165-66). His general and complete lack of knowledge in this field is fully substantiated by the fact that his projected estimate of the net profits for his 1965 operations was in fact a quarter of a million dollars in error (T. III 170-171).²⁰

Despite this demonstrable lack of experience in a very technical and complex business, the trustee proposed to use funds obtained by the sale of Certificates of Indebtedness No. 3 to unsophisticated purchasers to reopen the park and operate it again (T. III 359). The risk of his continuing the to date invariable course of failure can only be put upon the secured creditors and this is precisely the result if Certificates of Indebtedness No. 3 is given priority over them. The use of funds for working capital by inexperienced administrators leaves secured creditors with nothing of substantial value in return and this is precisely what courts must prevent. *In re Third Avenue Transit Corp.*, *supra*. Certificate No. 2 for \$50,000 is a clear case in point; this amount was placed ahead of the common creditors and there is now nothing at all to show for it. Stockholders and creditors cannot be compelled to use their money to provide temporary pleasure for the patrons of the Legend City Amusement Park.

V. The Motion for Sequestration of Rents and Profits Under These Circumstances Should Have Been Granted.

At the same time the district court authorized the issuance by the trustee of Certificates of Indebtedness No. 3, it also denied appellants' motion to sequester the rents and profits, if any, of the operation during the 1966 season. As mentioned earlier, the mortgage of appellants covers not only the real property owned by the debtor corporation and the personal property thereon, but it also covers the debtor corporation's interest in leases, licenses and franchises, and it specifically covers "all rents, issues, profits

²⁰In assessing the effect of his 1965 operating season, the trustee failed or refused even to examine figures from operation of the previous years (T. III 356-57).

and other money, now due or which may hereafter become due to the mortgagor from the ownership, lease, use, occupancy, or other exploitation of any other nature whatsoever of all or any portion of the premises described in Exhibit A." (T. III Exhibit I) Exhibit A to the mortgage is the legal description of the Legend City amusement park located on West Washington Avenue, Tempe, Arizona. The mortgage has been in default for a substantial length of time, at least since October 28, 1964, and is currently being foreclosed in state court proceedings subject to the continued supervision of the district court. Already much of the security for the mortgage has been destroyed by the acts of the trustee in the trustee's attempt to, without judicial sanction, break the leases and leasehold interests of the debtor in the concession agreements.

Appellants specifically petitioned this court for an order of sequestration of the rents and profits of the operation of the business since the appellants had a security interest therein. This was a proper motion and the court has the power to grant it. 4 *Collier, Bankruptcy*, ¶70.16 (14th ed. 1964); *Investors Syndicate v. Smith*, 105 F.2d 611 (9th Cir. 1939). The court would have been able to impound the monies received in 1966 over and above the 1966 operating costs so that if the secured creditors' claim was for some reason not fully paid, the impounded fund would be available. This was clearly contemplated by the mortgage.

The motion should have been granted in this case. Rents and profits should not be sequestered if the sequestration would put the mortgagor in a better position than he would have had, had bankruptcy not intervened. Otherwise, it should be granted. *Investors Syndicate v. Smith, supra*. Here, if the bankruptcy had not intervened, the appellants, as a matter of state law, could have had the rents and profits derived from any operation of the amusement park applied to interest and principal on their mortgage. The receiver appointed by the state court was originally forbidden for the time being from operating the property. None-

heless, he might have been authorized to lease the park and had the park in fact been reopened during the pendency of state court proceedings, the appellants would have had the rights to rents and profits after operating costs and taxes were paid in accordance with their assignment. No different result is or was sought here.

It must be emphasized that the appellants did not and do not seek to have every nickel and dime taken in for the payment of admission to every ride in the amusement park applied to the mortgage debt. Rather, the motion is directed to the rents and profits — that portion of the 1966 cash flow which is left over after the true operating expenses or trade payables are paid from the operating income. If the 1966 season resembles the 1965 season, the motion will be moot, since there was no operating profit. Indeed, all indications are that this will be the case. Nonetheless, it was error for the court to deny the motion on the eventuality that there might be an operating profit.

The secured position of appellants is in additional jeopardy because of the denial of the motion since the security for which the appellants bargained will be further diminished and the appellants may be required to pay costs and expenses which should fall upon the general unsecured creditors who did not rely on any security when they extended credit to the debtor corporation. *Mortgage Loan Co. v. Livingston*, 45 F.2d 28 (8th Cir. 1930). This Court should direct impoundment of any 1966 overflow funds to fully secure appellants.

CONCLUSION

It has been over eighteen months since the debtor's petition for reorganization under Chapter X was filed. During those eighteen months, the trustee has asked for and received authority to do as much, if not more, with the debtor's property than any trustee in the history of Chapter X. The appellants have objected to almost every act which the trustee has done, although the appellants did agree finally to give the trustee a chance to operate the park during the 1965 season to see if a profit could be made. Time has proven that the objections were well taken. The result is now clear. A profit cannot be made. The trustee, however, intends to keep going as long as the district court will let him. Meanwhile, the appellants have not received protection of any kind. Even those rulings which the district court made which could be construed to provide some protection to the secured creditors by requiring preservation of the property have been totally ignored by the trustee. The court's initial order of approval directed the payment of property taxes, and Certificate of Indebtedness No. 1 was specifically worded in such a manner as to require payment of property taxes, yet the trustee has totally disregarded that order.

In April, 1964 appellants bargained for and received security for the funds which they loaned. They did not bargain for an obligation to finance the continued operations of an amusement park with no compensation or debt service for a period of several years without any opportunity to formulate a plan for or to participate in the management of the park. Yet that also they received.

The debtor corporation has had its chance. The Chapter X Trustee has had his chance. The stockholders have had their chance. The Securities and Exchange Commission has had its say. Now it is time for the creditors to receive that which they should have received eighteen months ago. The orders of the district court appealed from should be reversed and the case remanded with instructions to the district court to forthwith adjudicate the

debtor corporation a bankrupt. The liquidation trustee should be directed to apply all monies received from the Chapter X Trustee to the payment of the unpaid property taxes and impound the balance, if any, to apply on appellants' secured debt to the extent necessary to satisfy it in full.

LEWIS ROCA SCOVILLE
BEAUCHAMP & LINTON

By JOHN P. FRANK

JOSEPH E. MCGARRY

JOHN L. HAY

900 Title & Trust Building

Phoenix, Arizona

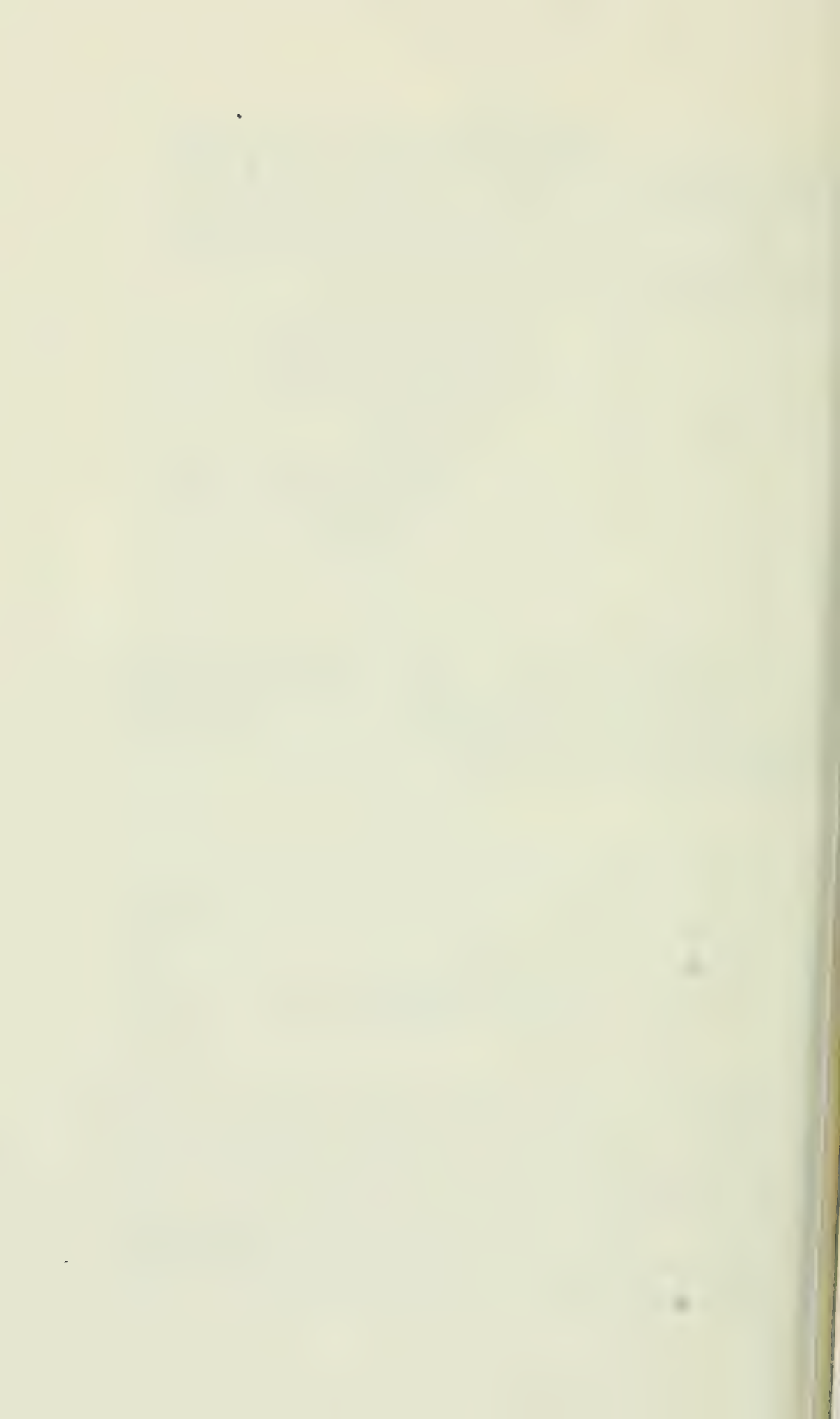
Attorneys for Appellants

July, 1966

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN P. FRANK

(Appendix Follows)



APPENDIX A

EXHIBITS

Exhibit No.	Identification	Page No. of T. III where identified	Page No. of T. III where admitted
1	Document - "Monthly 1965 Season Attendance - Receipts and Per Capita Patron Expenditure.	11	12
2	Document - "Necessary Employees - Three Days a week - Cost per Month"	11	19
3	Document - "Projected Fixed Costs of Operation Per Month Operating on a Three-Day Week for the Months of May, June, July, August and September, 1966."	19	21
3A	Document - "Projected Fixed Costs of Operation Per Month Operating on a Three-Day Week for the Months of May, June, July, August and September, 1966."	45	45
4	Projected Income Per Month for the Months of May, June, July, Aug. and Sept., 1966, Based on May, 1965 Attendance.	20	22
5	Fulford-Browning Balance Sheet, Dec. 31, 1965	26	28
6	"Statement of Costs for Securing Legend City for January 1966."	26	28
7	"Statement of Daily Operation of Legend City, May 1, 1965 through Nov. 30, 1965."	29	29
8	Balance Sheet December 31, 1965.	76	133
9	Projected Income Analysis for the Operating Season of 1966, May through September.	114	116
10	Fulford-Browning statement of income and expense for the period May 1 to November 30, 1965.	116	116
11	Report of the Trustee, July 31, 1965.	140	140

12 - Fulford-Browning financial statement as of November 30, 1965.	203	204
A - Stmt of Income and Expense for 11 months, ending December 31, 1964.	83	84
B - Breakdown of real estate taxes due to 1-31-66 attached to transmittal letter.	167	168
C-D-E - Illustration charts.	332	347
F - Trustee's Pro Forma Cash Flow Projection.	346	347
G-H - Illustrative Charts	403	404
I - Copy of Adams-Robinson note and mortgage	433	434

APPENDIX B

Walter E. Fulford, Trustee and Browning & Associates STATEMENT OF INCOME AND EXPENSE For the Period May 1, 1965 to December 31, 1965

Revenue	\$656,794.22	
Less: Adjustments to Revenue	4,151.29	\$652,642.93
Cost of Sales	\$ 71,761.90	
Concessionaire Expense	101,737.81	173,499.71
GROSS PROFIT		\$479,143.22
Payroll	\$209,096.28	
Payroll Taxes	13,727.05	
Power	20,922.74	
Water	4,999.50	
Gasoline, Oil & Lubricants	5,603.84	
Music & Entertainment	16,994.79	
Advertising & Publicity	38,306.93	
Promotion	7,629.21	
Laundry & Uniforms	1,101.76	
Depreciation	19,523.21	
Travel	507.29	
Entertainment	333.28	
Administrative Expenses		
Travel	5,363.66	
Entertainment	2,939.59	
Subsistence	7,840.78	16,144.03

Office Supplies & Expense	1,479.84	
Telephone & Telegraph	6,067.00	
Professional Services	2,197.05	
Postage	543.60	
Printing	5,522.22	
Property Taxes	10,945.52	
Licenses, Fees & Taxes	1,041.35	
Sales Tax	16,969.87	
Amortization of Fit-Out-Costs	21,908.88	
Interest Expense	3,332.34	
Cash Over & Short	354.28	
Rental Expense	5,549.25	
Supplies	21,036.11	
Repairs & Maintenance	14,813.32	
Insurance	29,819.56	
Protection Service	21,647.12	
Freight	732.07	
Contributions	238.21	
Miscellaneous Expense	4,244.99	
Bad Debt Expense	208.65	523,541.14
NET LOSS: Walter E. Fulford & Browning & Associates	(44,397.92)	

APPENDIX C

WALTER E. FULFORD

Trustee for

LEGEND CITY, INC., AN ARIZONA CORPORATION

TEMPE, ARIZONA

RECONCILIATION OF NET LOSS

For the Twelve Months Ended December 31, 1965

Net Loss - Walter E. Fulford, Trustee and Browning & Associates		\$ 44,397.92
Expenses - Walter E. Fulford, Trustee Debtor Corporation		
Wages and Payroll Taxes	\$ 3,247.51	
Power	801.11	
Office Supplies and Expenses	32.44	
Telephone and Telegraph	86.04	
Professional Services	1,233.90	

Interest Expense	736.60		
Rental Expense	77.68		
Repair and Maintenance	19.74		
Insurance	3,837.00	\$ 10,072.02	
Expenses - Walter E. Fulford, Trustee For Legend City, Inc., An Arizona Corporation:			
Depreciation	\$ 98,100.00		
Interest	48,295.20		
Property Taxes (1-1-65 to 5-1-65)	5,472.76	151,867.96	161,939.98
NET LOSS			<u>\$206,337.90</u>

APPENDIX D

Legend City, Inc., BALANCE SHEET December 31st, 1964

ASSETS

Current Assets:

Cash on Hand and in Banks	\$	1,123.74	
Accounts Receivable		8,212.04	
Notes Receivable		90.00	
Inventories—Supplies		16,212.19	
Prepaid Expenses		12,076.38	
Total Current Assets	\$		37,714.35

Park Land, Buildings and Equipment:

Land and Land Improvements	\$1,151,851.27		
Buildings and Equipment	2,767,523.13		
	<u>3,919,374.40</u>		
Less—Reserve for Depreciation	193,078.08	3,726,296.32	

Other Assets:

Organizational Expense	\$	1,337.94	
Trade Mark		245.00	
Refundable Deposits		14,005.00	15,587.94
Total Assets			<u>\$3,779,598.66</u>

LIABILITIES AND CAPITAL

Current Liabilities:

Accounts Payable	\$ 165,657.60
Notes and Contracts Payable	130,509.77
Accrued and Withheld Payroll	
Taxes and Insurance	25,341.43
Other Accrued Expenses and Taxes	55,780.57
Total Current Liabilities	\$ 377,289.37

Long-Term Liability

Mortgage Payable	636,486.29
------------------	------------

Deferred Credits

Advance Rentals	14,422.20
-----------------	-----------

Capital Stock:

Class A Common Voting Stock	\$ 926,591.00
Class B Common Voting Stock	97,911.00
Premium Received on	
Class A Stock	2,268,267.00

Earned Surplus

(Deficit): (\$402,572.99)

Add—Net Loss for Eleven Months

Ending December 31st,
1964 (138,795.33)

Earned Surplus (Deficit),

December 31st, 1964 (541,368.32) 2,751,400.75

Total Liabilities and Capital \$3,779,598.61

APPENDIX E

WALTER E. FULFORD

TRUSTEE FOR

Lengend City, Inc., an Arizona Corporation

Tempe, Arizona

December 31, 1965

BALANCE SHEET

December 31, 1965

ASSETS

Current Assets:

Cash on Hand and in Banks	\$	3,668.05	
Accounts Receivable		8,674.07	
Notes Receivable		90.00	
Inventories		19,198.22	
Prepaid Expenses		34,729.00	
Total Current Assets	\$		66,359.34

Park Land, Buildings and Equipment:

Land and Land Improvements	\$1,151,851.27		
Buildings & Equipment	2,841,087.01		
	\$3,992,938.28		
Less: Reserves			
for Depreciation	310,701.29	3,682,236.99	

Other Assets:

Organizational Expenses	\$	1,337.94	
Trade Mark		245.00	
Refundable Deposits		24,824.00	
Equity in Equipment Contracts		14,629.54	41,036.48
TOTAL ASSETS			\$3,789,632.81

LIABILITIES AND CAPITAL

Current Liabilities:

Accounts Payable			
(Prior to 1-8-65)	\$	165,657.60	
Accounts Payable			
(Subsequent to 1-8-65)		37,438.72	
Insurance Premiums Payable		5,677.27	
Accrued and Withheld			
Payroll Taxes and Insurance		36,397.74	
Notes & Contracts Payable			
(Current Portion)		177,142.00	
Accrued Interest Payable		63,621.24	
Accrued Property Taxes Payable		32,661.30	
Other Accrued Taxes			
and Expenses		21,365.60	
Mortgages Payable		138,638.94	
Total Current Liabilities	\$		678,600.41

Long-Term Liabilities:

Notes and Contracts				
Payable	\$230,842.00			
Less—Due within one				
Year (above)	177,142.00	\$	53,700.00	
Mortgage				
Payable	\$ 636,486.29			
Less—Due within one				
year (above)	138,638.94	497,847.35	\$551,547.35	

Deferred Credit:

Advance Rentals		14,422.20	
-----------------	--	-----------	--

Capital:

Class A Common Voting Stock	\$	926,591.00	
Class B Common Voting Stock		97,911.00	

Premium Received on		
Class A Stock	2,268,267.07	
Earned Surplus (Deficit)		
January		
8, 1965	\$(541,368.32)	
Add—Net Loss for The Twelve months		
ended December		
31,1965	(206,337.90)	
Earned Surplus (Deficit)		
December 31, 1965	(747,706.22)	2,545,062.85
TOTAL LIABILITIES		
AND CAPITAL		\$3,789,632.81

In the United States Court of Appeals
for the Ninth Circuit

ROY W. DEWELLES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

On Appeal from the Judgment of the United States District
Court for the Southern District of California

BRIEF FOR THE APPELLEES

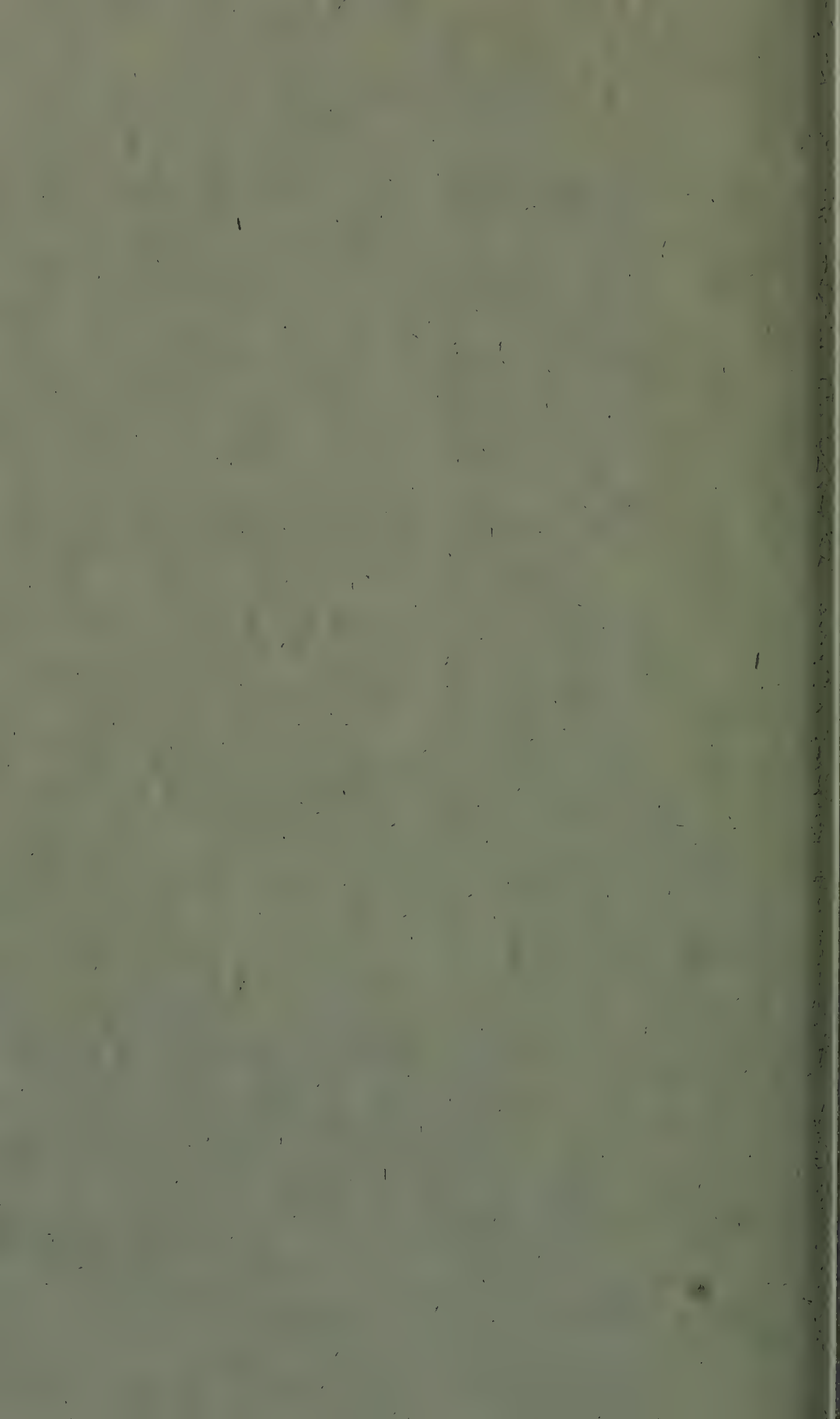
MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
JOSEPH KOVNER,
MARK S. ROTHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

EDWIN L. MILLER, JR.,
United States Attorney.

CHARLES H. MAGNUSON,
Assistant United States Attorney.



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21071

ROY W. DEWELLES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

**On Appeal from the Judgment of the United States District
Court for the Southern District of California**

BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court's findings of fact and conclusions of law (R. 193-196)¹ are not officially reported.

JURISDICTION

The instant action was brought to enjoin the collection of an assessment of income taxes for 1957 in the sum of \$25,353.91 and an assessment of income

¹ "R." references are to pages of the record on appeal.

taxes for 1958 in the sum of \$103,654.52 pursuant to 28 U.S.C., Section 1340, and 26 U.S.C., Sections 6213 and 7421(a). The District Court entered judgment dismissing the complaint on February 7, 1966. (R. 197.) On April 6, 1966, within 60 days, taxpayer filed a notice of appeal. (R. 198.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that the notice of deficiency was properly sent to taxpayer's last known address as required by Section 6212 of the Internal Revenue Code of 1954.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1954:

SEC. 6212. [as amended by Secs. 76 and 89(b) of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] NOTICE OF DEFICIENCY.

(a) *In General*.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) *Address for Notice of Deficiency*.—

(1) *Income and gift taxes*.—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12, if mailed to the taxpayer at his last known address, shall be sufficient for

purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * *

(26 U.S.C. 1964 ed., Sec. 6212.)

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * *

(26 U.S.C. 1964 ed., Sec. 6213.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN
ASSESSMENT ON COLLECTION.

(a) *Tax*.—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1964 ed., Sec. 7421.)

Federal Rules of Civil Procedure:

Rule 52.

FINDINGS BY THE COURT

* * * *

(b) *Amendment*. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 60.

RELIEF FROM JUDGMENT OR ORDER

* * * *

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.*

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

* * * *

STATEMENT

The pertinent facts, as found by the District Court are as follows:

For several years prior to 1962 and until August 18, 1962, taxpayer lived at 2177 Live Oak Drive, Los Angeles, California. This address was taxpayer's regular permanent address and his place of residence. (R. 193.) Although taxpayer had used other addresses for his filed income tax return for the years 1957, 1958 and in an amended return for 1959, taxpayer had established his address as 2177 Live Oak Drive for the purpose of dealing and corresponding with the Internal Revenue Service. (R. 193-194.) The Live Oak address was first so established at a meeting between taxpayer and an Internal Revenue Service Agent in April of 1962 and its establishment was further evidenced by the transmittal thereafter of all official correspondence by the Internal Revenue Service to taxpayer at such address. Up to August 18, 1962, all such correspondence was received by taxpayer. (R. 194.)

On August 18, 1962, taxpayer moved to the State of Mississippi, residing temporarily in a trailer camp in Mississippi City until he moved into a house in Pass Christian. However, he did not notify the In-

ternal Revenue Service either orally or in writing of this change of address prior to and including August 29, 1962. (R. 194.)

Pursuant to an investigation into taxpayer's income tax matters, the Internal Revenue Service sent taxpayer a notice of deficiency (90-day letter) on August 29, 1962, addressed to him at 2177 Live Oak Drive, Los Angeles, California, the address to which previous correspondence had been sent, since the Internal Revenue Service had received no notification from taxpayer that he had a new address. (R. 194.) Taxpayer actually received this notice of deficiency no later than November 22 or 23, 1962, and it was the belief of the District Court that taxpayer received the notice much before November 22, 1962. (R. 195.) The time for filing a petition with the Tax Court expired on November 27, 1962, and on that date taxpayer had not filed any petition with that court. (R. 195.) Therefore the Government proceeded to collect the taxes due according to the notice of deficiency sent to taxpayer. ~~(R. —.)~~ However, taxpayer brought this suit to enjoin the United States from collecting the amounts assessed under the notice of deficiency sent on August 29, 1962, on the ground that the notice of deficiency was not proper since not sent to taxpayer at his last known address. Taxpayer contended that he used a different address on his tax returns and also that he had moved from the Live Oak address by the time the notice of deficiency was sent. (R. 2.) The District Court found that the Live Oak address was the one furnished by the tax-

payer to an Internal Revenue Service Agent, that taxpayer had received official correspondence at that address in June, 1962, and that taxpayer had not notified the Internal Revenue Service of any change of address prior to the date the notice of deficiency was sent. The District Court then found that 2177 Live Oak Drive, Los Angeles, California, was taxpayer's last known address on August 29, 1962, and therefore the notice of deficiency was properly sent to taxpayer at his last known address. (R. 193-196.) The District Court, therefore, granted the Government's motion to dismiss taxpayer's complaint. (R. 196, 197.)

SUMMARY OF ARGUMENT

Taxpayer sued to enjoin the United States from collecting income taxes which had been assessed, claiming that the notice of deficiency was not sent to him at his last known address, as required by Section 6212(b) of the Internal Revenue Code and, therefore, no assessment or collection of the taxes could be made. However, the District Court dismissed taxpayer's complaint after holding that the notice of deficiency was properly sent.

Section 6212(b) of the Internal Revenue Code provides that the notice of deficiency must be sent to taxpayer at his last known address, and this Court has held that where the Commissioner learns or is advised by the taxpayer that taxpayer has changed his address, the Commissioner must use the new address.

In this case, taxpayer filed returns using an address in Encino, California. Subsequently a Revenue Agent began investigating some of taxpayer's returns, and during a conference taxpayer told the Agent he lived at 2177 Live Oak Drive, Los Angeles, California. Thereafter the Commissioner sent taxpayer official correspondence at the Live Oak address, which taxpayer admittedly received. A few weeks after taxpayer moved from the Live Oak address to Mississippi without notifying the Commissioner, the Commissioner sent taxpayer a notice of deficiency addressed to the Live Oak address. Taxpayer did not petition the Tax Court within 90 days of the date the notice of deficiency was sent, so the Commissioner proceeded to collect the tax.

It is clear that under the above facts the Commissioner sent the notice of deficiency to taxpayer at his last known address as required by Section 6212 of the Internal Revenue Code. Therefore, taxpayer was prohibited by Section 7421(a) of the Internal Revenue Code from bringing any suit to enjoin the collection of the tax and the District Court correctly dismissed taxpayer's complaint.

ARGUMENT

The District Court Correctly Held That the Notice of Deficiency Was Properly Sent to Taxpayer's Last Known Address as Required by Section 6212 of the Internal Revenue Code of 1954

Section 7421(a) of the Internal Revenue Code of 1954, *supra*, specifically provides that no suit may be brought to enjoin the collection of any tax in any

court; except as provided in Section 6212(a) and (c) and 6213(a). These latter sections deal with the sending by the Commissioner of a notice of deficiency, commonly known as a 90-day letter. Section 6212(a), *supra*, authorizes the Commissioner to send the taxpayer a 90-day letter by certified or registered mail when it is determined that there is a deficiency in tax. Section 6212(b), *supra*, states that the sending of the 90-day letter to the taxpayer "at his last known address, shall be sufficient for purposes of * * * this chapter * * *." Section 6213(a), *supra*, allows the taxpayer a period of 90 days from the day the notice of deficiency is mailed to petition the Tax Court for a determination on the deficiency and prohibits the Commissioner from assessing or collecting the tax involved either prior to the sending of the notice of deficiency, or during the 90-day period in which taxpayer may petition the Tax Court.²

However, if the notice of deficiency is properly sent and the taxpayer does not petition the Tax Court within the 90-day period, the Commissioner may proceed to collect the tax, and no suit to enjoin such collection may be brought.

In the instant case, the Commissioner determined that there was a deficiency in taxpayer's income for the years 1957 and 1958. Since the time for assessment of this deficiency was running out, and taxpayer would not agree to an extension of the time, the

² There is one exception to this rule which allows the Commissioner to make a jeopardy assessment under Section 6861, but that is not involved in the instant case.

Commissioner sent taxpayer a notice of deficiency on August 29, 1962, for the years 1957 and 1958. This notice was addressed to taxpayer at 2177 Live Oak Drive, Los Angeles, California. (Ex. 5.) Although taxpayer had used an address in Encino, California, on his most recently filed returns, the taxpayer had, in a conference with Internal Revenue Service Agent Kosman in April, 1962, informed Kosman that his address was 2177 Live Oak Drive, Los Angeles. (R. 194; Tr. 91.)³ Thereafter on June 28, 1962, Agent Kosman sent a certified letter to taxpayer at the Live Oak address requesting taxpayer to sign and return Form 872, a consent to the extension of the statute of limitations. Taxpayer's wife signed the receipt for the letter, such receipt showing the address of 2177 Live Oak Drive (Ex. A), and taxpayer admits that he received the letter (Tr. 50). There is no evidence that taxpayer objected at that time to receiving official correspondence from the Internal Revenue Service at the Live Oak address, which he himself had previously furnished to the Internal Revenue Service Agent. A second request to submit Form 872 was sent by the Internal Revenue Service to taxpayer on August 13, 1962, also addressed to the Live Oak address (Ex. B), although this letter was not sent by certified mail. Furthermore, on August 28, 1962, the Commissioner sent the Revenue Agent's report to taxpayer at the Live Oak address (Ex. E) and taxpayer has stipulated that he received it (Tr.

³ "Tr." references are to pages of the transcript of testimony.

47-48). Since taxpayer did not execute the consents to extend the statute of limitation, the Commissioner sent taxpayer a notice of deficiency on August 29, 1962. This notice was also sent to the Live Oak address because that is the address at which the Commissioner had been communicating with the taxpayer up to that time, and the Commissioner had not received any notification that any other address should be used. Therefore, the District Court correctly dismissed the taxpayer's complaint since, under Section 7421(a) of the Code, no suit to enjoin the collection of the tax involved here could be brought once it was shown that the Commissioner properly sent a notice of deficiency to taxpayer at his last known address and taxpayer did not petition the Tax Court within the 90-day period.

Taxpayer's main contention in this case is that the Commissioner was required to send the notice of deficiency to the Encino address used by taxpayer on the last return which he filed, either instead of or in addition to sending the notice to the Live Oak address. Since the Commissioner did not do so, argues the taxpayer, the notice of deficiency was invalid and this suit may be maintained to enjoin collection of the tax. There is absolutely no merit to this argument.⁴

⁴ It is interesting to note that after taxpayer lost in the District Court he asked that court's permission to prosecute this appeal in forma pauperis. That court denied the request on the ground that the appeal was frivolous. Taxpayer then moved in this Court to appeal in forma pauperis and the United States opposed the motion, citing the District Court

The language of Section 6212(b) is clear that the Commissioner merely has to send the notice of deficiency to taxpayer at his "last known address". There is no further definition of that term in the Code or Regulations which is applicable here, and indeed, none would appear necessary. Last known address would appear to mean exactly what it says, and not, as taxpayer urges, the address used on the last filed tax return when a new address has subsequently been furnished by taxpayer and used by the Commissioner or, in other words, former known address. This Court in *Cohen v. United States*, 297 F. 2d 760, made it clear that the address given by the taxpayer on his return is subject to change, saying (p. 773):

The Commissioner or one of his agents may learn that the taxpayer has changed his address, or he may be so advised by the taxpayer. In such a case, he must use the new address.

See also *Luhring v. Glotzbach*, 304 F. 2d 556 (C.A. 4th).

The last tax return filed by taxpayer prior to August 29, 1962, was an amended 1959 return which he filed in August, 1960. However, in April, 1962, he informed Revenue Agent Kosman, during a personal interview, that he lived at 2177 Live Oak Drive, Los Angeles, and taxpayer subsequently received, by his own admission, official correspondence from the Internal Revenue Service at that address. In light of these

holding of frivolity. This Court denied taxpayer's motion on April 11, 1966.

facts and the applicable law, it is indeed specious of taxpayer to argue that the last known address was the Encino address used on the tax returns.

Taxpayer also testified that he orally notified Revenue Agent Kosman on August 17, 1962, that he was moving to Mississippi the following day (Tr. 15-16) and, therefore, contends that the Mississippi address was his last known address. The simple answer to this is that the District Court specifically refused to believe taxpayer's testimony in this regard, and found as a matter of fact that taxpayer never notified the Internal Revenue Service in writing or orally of any change of address from April, 1962, to and including August 29, 1962. (R. 194.) This finding of fact is supported by the testimony of Revenue Agent Kosman who testified that taxpayer did not tell him he was moving to Mississippi during their meeting on August 17, 1962, and that prior to August 29, 1962, he was not aware of any change of taxpayer's address from 2177 Live Oak Drive. (Tr. 97-98.) It is well established that the resolution of conflicting evidence is within the discretion of the trial judge who has observed the demeanor of the witnesses, and may not be overruled unless shown to be clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure. Certainly taxpayer has made no such showing in this case.

The fact that taxpayer actually received the notice of deficiency prior to the expiration of the 90-day period is, as taxpayer himself states, "irrelevant and immaterial". (Br. 30.) The Internal Revenue Code

provides merely that notice must be properly sent, and not that it must have been received by the taxpayer. *Brown v. Lethert*, 360 F. 2d 560 (C.A. 8th). Since the court found that the notice was sent to taxpayer's last known address there is no need to consider whether or not taxpayer ever received it. Only if the court should find that the 90-day letter was not sent to taxpayer at his last known address does it have to consider taxpayer's actual receipt and its effect. Taxpayer admitted he received the 90-day letter on November 22, 1962, or November 23, 1962. (Tr. 19-20), and, therefore, contends that he only had four or five days in which to petition the Tax Court. However, the District Court believed that taxpayer actually received the 90-day letter ^{much} ~~must~~ before November 24 and, therefore, had ample time to petition the Tax Court. (R. 195.) The evidence showed that taxpayer made thorough provisions for the forwarding of his mail. He left instructions with the Post Office to forward mail from 2177 Live Oak Drive to his post office box in Encino, California. He then had mail either forwarded from Encino to him in Mississippi or picked up by his attorney who sent it to him. (Tr. 22-23.) The evidence, therefore, amply supports the District Court's belief that taxpayer received the 90-day letter in time to petition the Tax Court. In fact, even the four or five days which taxpayer admits he had would seem to be sufficient in this case since he already had counsel advising him on this matter who, even if busy, could have filed a petition sufficient to invoke the jurisdiction of the

Tax Court which could have been amended later if necessary.⁵

Taxpayer introduces new evidence on this appeal which he then discusses in his brief. This new evidence, consisting of affidavits of Revenue Agent Kosman, Zella DeWelles, and the original of the Form 872 sent to taxpayer were not introduced at the trial, are not part of the record in this case, and, therefore, are not before the Court. If taxpayer wished to introduce new evidence after the trial, this Court has said that the proper procedure is a motion under Rule 60(b)(1), *supra*, of the Federal Rules of Civil Procedure in the District Court. If such motion is granted, then taxpayer may move this Court to remand, whereas if the motion is denied taxpayer may appeal such order and consolidate it with the appeal now pending. *Greear v. Greear*, 288 F.2d 466 (C.A. 9th). It might be noted, however, that this new evidence does not add anything to taxpayer's case since Revenue Agent Kosman's affidavit shows that he merely followed a procedure of using as the address on the Form 872 the address used by taxpayer on the return. There is no dispute that taxpayer used the Encino address on his returns for the years involved, but, as we have previously shown, this was not the last known address.

⁵ The record shows that taxpayer stated he would have to consult his attorney when the Revenue Agent asked him in June, 1962, to sign the consent form (Tr. 14-15). It is, therefore, obvious that he already had counsel who was familiar with taxpayer's tax problems.

Taxpayer's discussion of *Flora v. United States*, is not directly relevant to this case. While it is true that taxpayer here will not be able to litigate his tax liability for the years 1957 and 1958 in the Tax Court, a recent Eighth Circuit case, following the established rule, holds that even where taxpayer did not receive the 90-day letter and this was known by the Commissioner, no suit to enjoin the collection of the tax could be brought if the 90-day letter were properly sent to taxpayer. *Brown v. Lethert, supra*. Taxpayer has no constitutional right to litigate in the Tax Court. Congress provided in the Internal Revenue Code a reasonable system whereby taxpayers could petition the Tax Court. The fact that taxpayer may not now petition the Tax Court in this case does not deny him his constitutional right to litigate his tax liability. He may pay the tax and sue for a refund, at which time the merits of his claims will be adjudicated. Furthermore, it is apparent that taxpayer here could have litigated in the Tax Court had he so desired, as evidenced by the above discussion.

Finally, there is no merit to taxpayer's request that the Commissioner should have sent two notices of deficiency to taxpayer, one to the Live Oak address and the other to the Encino address. This argument may have some validity where a taxpayer maintains two addresses and has dealings with the Commissioner at both. But that is not the case here. There was no doubt in the Commissioner's mind that the Live Oak address was the only proper address. Taxpayer had furnished this address to the Agent, the Commissioner had sent official correspondence to that address

which taxpayer received, and the Commissioner had no notification that taxpayer was no longer at that address. In this case, the District Court was correct in finding that the notice of deficiency was properly sent to taxpayer at his last known address and, therefore, the taxpayer's complaint must be dismissed.

CONCLUSION

For the foregoing reasons the decision of the District Court is correct and its judgment should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
JOSEPH KOVNER,
MARK S. ROTHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

EDWIN L. MILLER, JR.,
United States Attorney.

CHARLES H. MAGNUSON,
Assistant United States Attorney.

DECEMBER, 1966.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: day of December, 1966.

MARK S. ROTHMAN
Attorney

UNITED STATES COURT OF APPEALS

C.J. FITZHARRIS,
Appellant,
vs.
HERMAN TAPIA, JR.,
Appellee.

No. 21073

APPELLANT'S BRIEF

Appeal from the United States
District Court for the Northern
District of California
Southern Division

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

CLIFTON R. JEFFERS
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1475

Attorneys for Appellant.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.J. FITZHARRIS,)
)
Appellant,)
) No. 21073
vs.)
)
HERMAN TAPIA, JR.,)
)
Appellee.)
)
)
)
)
)

APPELLANT'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus is conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by C.J. Fitzharris, Superintendent of the California Training Facility at Soledad, California, respondent in the court below and custodian of appellee, Herman Tapia, Jr., from an order of the United States District Court for the Northern District of California,

Southern Division. That order granted appellee's application for a writ of habeas corpus and directed that he be discharged from the custody of appellant. In issuing its order, the District Court rejected appellant's contentions that appellee Tapia is precluded from relief by reason of his failure to exhaust available state remedies and his deliberate bypassing of state remedies, and held that appellee was denied the right to counsel within the meaning of Escobedo v. Illinois, 378 U.S. 478 (1964), even though he had at no time requested counsel and further held that appellee was not precluded from relief because no retroactivity problem was present.

Proceedings in the State Courts

In an information filed by the District Attorney of Los Angeles County, appellee was charged with burglary in violation of California Penal Code section 459. Trial commenced on June 22, 1964. A jury verdict finding appellee guilty of second degree burglary was returned on June 24, 1964. Probation was denied, and on August 4, 1964, judgment was entered sentencing appellee to state prison for the term prescribed by law.

There was no appeal from the judgment of conviction. In November, 1964, and March and May, 1965,

appellee filed for writs of habeas corpus in the state courts. Separate applications were filed in San Bernardino County Superior Court, the District Court of Appeal for the First Appellate District and the California Supreme Court. Each application was denied without hearing or opinion. In each of the foregoing applications for habeas corpus, appellee raised the issues which were presented to the court below.

Proceedings in the Federal Courts

On June 15, 1965, appellee filed an application for writ of habeas corpus with the United States District Court for the Northern District of California, Southern Division. On the same date, an order to show cause issued directed to appellant. Appellant's return to the order to show cause was filed July 20, 1965. On August 10, 1965, appellant filed a supplement to the return to order to show cause. Appellee, acting in propria persona, filed a traverse. On August 31, 1965, the District Court appointed appellee's present counsel, John Mallick, to represent him.

On November 23, 1965, appellee filed a motion for an evidentiary hearing and the same day an order issued directing that the hearing be held on December 10, 1965.

On June 7, 1966, the District Court entered

an order directing appellee's discharge from custody. On June 20, 1966, appellant filed notice of appeal to this Court.

STATEMENT OF FACTS

On April 14, 1964, Officers Nicholl and Senneff of the Los Angeles Police Department visited appellee at his home and questioned him concerning a burglary (*RT 4, 5, 19).

The conversation took place in the living room of appellee's home (RT 12). Shortly after the officers arrived, appellee's father entered the house and remained therein during the remainder of the conversation (RT 22-23, 26, 32). During this conversation, appellee admitted participating in the burglary of which he was subsequently convicted (RT 20-21). The conversation was friendly, and the statements made by appellee were free and voluntary, not induced by threats or offers of reward (RT 21, 23-24, 30-31, 33, 35-36), and the District Court so found (District Court order, pp. 3-4).

At no time did appellee request to see an attorney (RT 24, 32-33). He was not advised that

*"RT" refers to the Reporter's Transcript of the evidentiary hearing conducted in the court below on December 10, 1965.

he had a right to see an attorney, nor was he advised of his right to remain silent or that anything he said could be used against him (RT 7-8, 24). Appellee was not so advised because "at this time there was no department policy to this effect, and we had not at that time been so advising arrestees." (RT 24: 14-16).

The statements made by appellee were introduced without objection against him in the trial court proceedings.

Appellee was informed in writing by his trial counsel of the availability of appeal, the procedure to be followed in perfecting an appeal, the time within which the notice of appeal should be filed, that his counsel would not file an appeal but that he was free to do so, that he was entitled to appointed counsel on appeal and transcripts at no expense (RT 16; Respondent's Exhibit "A"). There was no appeal from the judgment of conviction.

SUMMARY OF APPELLANT'S CONTENTIONS

I. The District Court failed to consider the effect of appellee's failure to appeal.

II. The effect of appellee's failure to object in the state court proceedings was not considered by the district court.

III. The District Court erred in holding that appellee was denied the right to counsel within the meaning of the Escobedo decision even though there was no request for counsel.

IV. The District Court erred in holding that appellee was not precluded from relief because no retroactivity problem was present.

ARGUMENT

I

THE DISTRICT COURT FAILED TO CONSIDER
THE EFFECT OF APPELLEE'S FAILURE TO APPEAL.

Appellee was informed by letter from his trial counsel of the availability of appeal, the procedure to be followed in perfecting an appeal, the time within which his notice of appeal should be filed, that his counsel would not file an appeal in his behalf but that he was free to do so, that he was entitled to have counsel represent him on appeal, and the Reporter's Transcript and Clerk's Transcript would be made available at no expense to him (Respondent's Exhibit "A").

Despite the knowledge of the availability of appeal, as indicated by appellee in his habeas corpus application, no appeal was taken from the judgment of conviction. In seeking relief in the Court below, appellee did not explain his failure to appeal. He is

thus attempting to use the federal courts as a substitute forum in which to litigate a federal question which should properly have been raised in the California courts.

Appellee's failure to appeal in this context brings into operation the two separate doctrines of (1) whether he deliberately by-passed available state remedies and (2) if he has under California state law an excuse for not appealing from which relief will be granted, whether he has exhausted available state remedies. We realize that this places the habeas applicant such as appellee on the horns of a dilemma but appeal, after all, is the ordinary procedural vehicle for the correction of trial court errors.

Although both issues of waiver and failure to exhaust available state remedies were raised by appellant in the court below, they were rejected without comment in the court order directing appellee's release.

Under the doctrine of Fay v. Noia, 372 U.S. 391 (1963), in determining whether appellee is precluded from relief on the grounds of waiver, the issues became (1) whether the State of California has provided petitioner with an orderly remedy by which to vindicate his asserted constitutional right, and (2) whether petitioner made a considered choice to abandon the privilege of seeking to vindicate that federal right in the state courts.

Fay v. Noia, supra at 439; Gladden v. Gidley, 337 F.2d 575, 579 (9th Cir. 1964); see Richardson v. Oliver, Civ. No. 9244 N.D.N.D. Cal., March 21, 1966.

In view of the letter from appellee's counsel and appellee's acknowledgment that he was fully aware of the procedure for perfecting an appeal as prescribed by Rule 31(a) of the California Rules of Court, few cases will present such clear evidence of "an intentional relinquishment or abandonment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458, 468 (1938), constituting a deliberate bypassing of a state remedy.

The California law is well settled that the writ of habeas corpus cannot substitute for an appeal. In re Lessard, supra, 62 Cal.2d 497, 505 (1965); In re Waltreus, 62 Cal.2d 218, 225 (1965); In re Mitchell 56 Cal.2d 667, 671 (1961); In re Winchester, 53 Cal.2d 528, 532 (1960); In re Dixon, 41 Cal.2d 756, 759 (1953); In re Lindley, 29 Cal.2d 709, 722 (1947). In that petitioner sought to present his contentions by habeas corpus without explaining his failure to pursue the remedy of appeal, he did not properly invoke an available state remedy, and hence, cannot be said to have exhausted it. Since he was fully aware of the availability of appeal and the procedures to be followed in perfecting it, his failure to appeal constituted a bypassing of

state procedures, fully justifying the California courts in refusing to entertain his claim. This action by the state courts is fully consistent with the doctrine of Fay v. Noia, supra. As pointed out in Townsend v. Sain 372 U.S. 293, 317:

"The standard of inexcusable default set down in Fay v. Noia does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures."

In light of the nature of claims sought to be presented by petitioner, it is significant to note that the time within which he could have perfected an appeal did not expire until nearly two months after the decision was rendered in Escobedo v. Illinois, supra, 378 U.S. 478 (1964). Under these circumstances "the burden should be upon the petitioner at the very outset to allege facts which if proven would excuse his failure to appeal." [Citations omitted] Richardson v. Oliver, supra at 6.

In that petitioner failed to allege facts excusing his failure to appeal and thereby further substantiated the lack of appeal as being a considered knowing and deliberate decision to bypass state procedures, he is precluded from relief in this Court. We submit that the Court below erred in failing to so hold.

In directing appellee's release, the District Court order ignores the question of whether appellee has exhausted available state remedies as required by Title 28, U.S.C., § 2254.

Judgment of conviction was entered against appellee on August 4, 1964. Under California State Law, to effect a timely appeal, notice of appeal should have been filed within ten days following rendition of the judgment. Rule 31(a), California Rules of Court. Appellee did not file notice of appeal and he has not shown that he attempted at any time to perfect an appeal from that judgment by seeking relief in the California courts from his failure to file a timely notice of appeal. A procedure is provided under Rule 31(a) of the California Rules of Court whereby persons seeking to reinstate their right to appeal may file affidavits with the court explaining their failure to file a timely notice of appeal. The California Supreme Court has shown liberality in interpreting this rule so as to grant relief in a number of cases where good cause has been shown. See e.g. People v. Davis, 62 Cal.2d 806 (1965).

The doctrine of Fay v. Noia, 372 U.S. 391 (1963) is consistent with holding that appellee's failure to pursue California procedures to seek relief from his failure to file a timely notice of appeal, constitutes a

failure to exhaust available state remedies. See Holley v. Cheuvront, 351 F.2d 615 (9th Cir. 1965); Gravette v. Maxwell, 340 F.2d 95 (6th Cir. 1965); Curtis v. Buchkoe, 336 F.2d 32 (6th Cir. 1965). As Judge Sherrill Halbert pointed out in Richardson v. Oliver, supra, Civ. No. 9244 N.D.N.D. Cal., March 21, 1966, at pp. 3-4 of the Memorandum Opinion,

"A state prisoner who failed to appeal from judgment of the trial court within the time allowed by law and who has a valid excuse for such failure, should as a matter of course pursue his statutory remedies in California before seeking relief in the federal courts. Nothing in the present record indicates that petitioner has availed himself of that remedy." [Footnote omitted].

We submit that until appellee pursues this remedy or demonstrates that such relief is not available to him, he has not exhausted state remedies that were available at the time his petition was filed and remain available at this time.

II

THE EFFECT OF APPELLEE'S FAILURE TO OBJECT IN
THE STATE COURT PROCEEDINGS WAS NOT CONSIDERED
BY THE DISTRICT COURT.

There was no objection to the introduction in

the trial proceedings of the evidence which appellee now contends deprived him of a constitutional right entitling him to release. It was earlier established in California law that, "A failure to object to the introduction of evidence which defendant alleges was illegally obtained precludes the successful presentation of the issue at the appellate level." In re Lessard, 62 Cal.2d 497, 503 (1965); see also 3 Cal.Jur.2d, Appeal and Error, § 140 at 604; 4 C.J.S., Appeal and Error, § 228 at 665.

The fact that the decision not to object may have been a part of trial strategy - a decision not participated in by appellee, or if so, even objected to by him - would not relieve appellee from the requirement of pursuing state remedies to vindicate the alleged constitutional right. Nelson v. People of the State of California, 346 F.2d 73, 81 (9th Cir. 1965). See Henry v. Mississippi, 379 U.S. 443 (1965); Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965). This is especially significant since appellee did not attack the competency of his trial counsel. Under these circumstances, the more obvious inference is that the failure to object was a tactical trial decision.

This failure to object to the introduction of the evidence when considered in connection with appellee's failure to appeal (see Argument I, supra) points it up as

being the first step in the process of deliberately bypassing available state remedies.

As we understand this Court's decision in Nelson v. People of the State of California, supra, California's contemporaneous objection rule serves a legitimate state interest, and a failure to invoke it may alone constitute deliberate bypassing of state procedures precluding a habeas applicant from relief in federal court. In analyzing Henry v. Mississippi, supra, this court stated in Nelson,

"We think that Henry limits Fay v. Noia at least to this extent - that it stands for the proposition that counsel's decision, although made 'without prior consultation with an accused,' to by-pass the contemporaneous-objection rule as part of trial strategy, will nevertheless 'preclude the accused from asserting constitutional claims' (id. at 451, 85 S.Ct. at 569). Thus the broad language in Fay, to the effect that the decision (there, a decision not to appeal) must be the choice of the petitioner, and that a choice made by counsel, not participated in by petitioner, does not automatically bar relief, does not here apply." [footnotes omitted] 346 F.2d at 81.

The failure of the Court below to consider the
13.

impact of appellee's non-compliance with California's contemporaneous objection rule on the question of deliberate bypassing resulted in the erroneous conclusion that appellee was entitled to release.

III

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLEE WAS DENIED THE RIGHT TO COUNSEL WITHIN THE MEANING OF THE ESCOBEDO DECISION EVEN THOUGH THERE WAS NO REQUEST FOR COUNSEL.

In the case at bar, appellee at no time requested to see an attorney. Despite this fact, the Court below held that he had been denied the right to counsel within the meaning of Escobedo v. Illinois, 378 U.S. 478 (1964), concluding that "in petitioner's case, his failure to request counsel was not fatal." (District Court Order, p. 6). In so concluding, we submit that the District Court erred.

The scope of the Escobedo decision was recently made clear by the United States Supreme Court holdings in Miranda v. Arizona, 34 U.S. L.Week 4521 (U.S. June 13, 1966), and Johnson v. New Jersey, 34 U.S. L.Week 4592 (U.S. June 20, 1966).

In passing upon the question of the retroactivity of Escobedo and Miranda, the court in Johnson v. New Jersey, delineated more precisely the import of Escobedo, stating,

"Apart from its broad implications, the precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial,

'[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent. . . .'

378 U.S., at 490-491. . . . [emphasis added]

"As for the standards laid down one week ago in Miranda, if we were persuaded that they had been fully anticipated by the holding in Escobedo, we would measure their prospectivity from the same date. . . . disagreement among other courts concerning the implications of Escobedo however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in Miranda" [footnote omitted] Id. at 4596-4597.

It is thus clear that there is a denial of the

right to counsel in the context with which we are here dealing only when all the requirements of the Escobedo holding are present, including a request and denial of the opportunity to consult with counsel.

The necessity of a request for counsel to invoke the protective shield of Escobedo is further illustrated by Miranda v. Arizona, supra. There, the court, in dealing with in custody interrogation, set forth procedural safeguards which are not dependent upon a request for counsel, and in other respects are more expansive than those announced in Escobedo. However, the principles announced in Miranda emanate from the privilege against self-incrimination contained in the Fifth Amendment of the United States Constitution, while Escobedo is based on the denial of the right to counsel within the meaning of the Sixth Amendment. During the course of the Miranda opinion, the court recognizes that,

"A different phase of the Escobedo decision was significant in its attention to the absence of counsel during the questioning. . . . In Escobedo however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms.

/

/

Rather, they denied his request for the assistance of counsel, 378 U.S., at 481, 488, 491..^{35/} 34 U.S. L.Week at 4529.

Against this interpretive background, it seems hardly arguable that appellee can successfully assert that he was deprived of the constitutional right to counsel within the meaning of Escobedo v. Illinois, supra, 378 U.S. 478 (1964).

We therefore submit that the Court below committed error in so holding and respectfully urge that the order directing appellee's release be reversed.

IV

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLEE WAS NOT PRECLUDED FROM RELIEF BECAUSE NO RETROACTIVITY PROBLEM WAS PRESENT.

Appellee's state trial commenced on June 22, 1964. The jury verdict of guilty was returned on June 24, 1964. The order of the Court below notes that the decision of Escobedo v. Illinois, supra, was rendered on June 22, 1964, and then states, "Since the verdict in this case was not even arrived at when

^{35/}

The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. [Citation omitted]."

the Escobedo decision was rendered, no 'retroactivity' problem exists in this case." (p. 4).

In so holding and ordering appellee's release, the Court below committed error requiring reversal.

Johnson v. New Jersey, supra, 34 U.S. L. Week 4592 (U.S. June 20, 1966) held that Escobedo and Miranda are to be applied only prospectively. The court was clear and explicit in specifying the dates beyond which Escobedo and Miranda do not apply.

"We hold that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that Miranda applies only to cases in which the trial began after the date of our decision one week ago." Id. at 4593 [emphasis added].

"All of the reasons set forth above for making Escobedo and Miranda non-retroactive suggests that these decisions should apply only to trials begun after the decisions were announced

"At the same time, we do not find any persuasive reason to extend Escobedo and Miranda to cases tried before those decisions were announced, even though the cases may still be on direct appeal.

. . . .

"In light of these additional considerations,

we conclude that Escobedo and Miranda should apply only to cases commenced after those decisions were announced. . . . Because Escobedo is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which Escobedo was decided." Id. at 4596.

After pointing out that Miranda established guidelines in addition to those set forth in Escobedo, the court states, "these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1964." Id. 4597.

It is abundantly clear that even if appellee came within the holding of Escobedo v. Illinois, supra (which appellant does not concede, see Argument III, supra) he would not be entitled to relief since his trial commenced on the same date the Escobedo decision was rendered, June 22, 1964, and the benefits of that decision are only available to persons whose trials commenced after that date.

It is equally obvious that Miranda is not available to appellee since it applies only to cases in which the trials commenced after June 13, 1966.

Since this case does indeed present a retroactive problem of such magnitude that appellee is precluded from relief, we submit that the order of the court

below must be reversed.

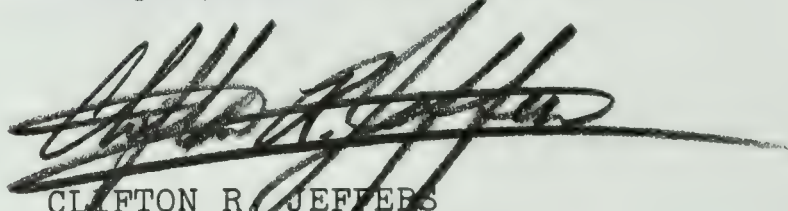
CONCLUSION

For the foregoing reasons, appellant respectfully urges that the order of the District Court granting the writ of habeas corpus should be reversed.

Dated: July 12, 1966.

THOMAS C. LYNCH, Attorney General
of California

ROBERT R. GRANUCCI
Deputy Attorney General

A large, stylized handwritten signature in dark ink, likely belonging to Clifton R. Jeffers, is written over the printed name and title.

CLIFTON R. JEFFERS
Deputy Attorney General

Attorneys for Appellant

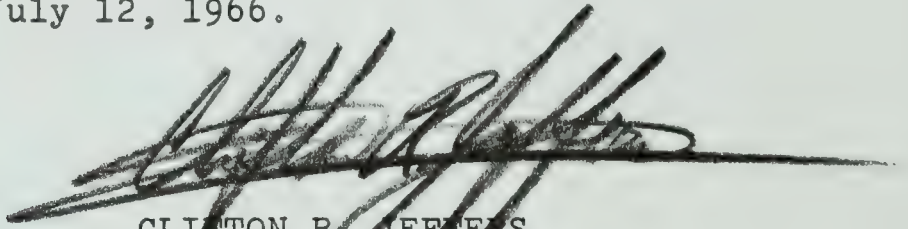
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CERTIFICATE OF COUNSEL

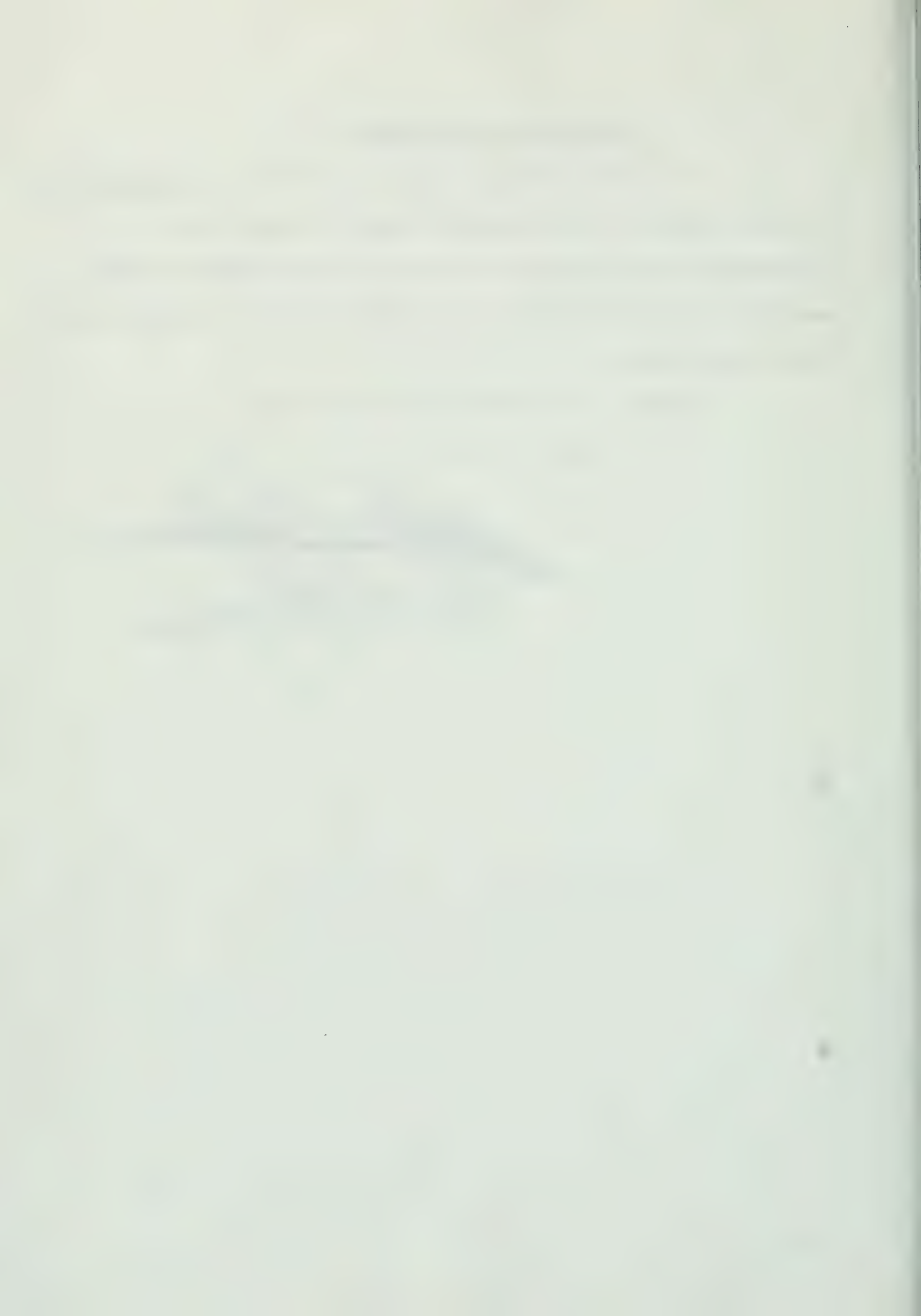
I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: San Francisco, California

July 12, 1966.

A handwritten signature in dark ink, appearing to read 'Clinton R. Jeffers', is written over a horizontal line. The signature is stylized with long, sweeping strokes.

CLINTON R. JEFFERS
Deputy Attorney General
of the State of California



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND R. FOWLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

AUG 8 1967

WM. B. LUCK, CLERK

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
JAMES E. SHEKOYAN,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
JAMES E. SHEKOYAN,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAYMOND R. FOWLE,

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On January 20, 1965, a five count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2]. ^{1/}

The indictment charged appellant with the violation of Federal narcotic laws relating to the possession and sale of heroin and cocaine [R. T. 2].

Appellant was convicted on all five counts by a jury on

^{1/} "C. T." refers to Clerk's Transcript.

June 25, 1965 [C. T. 16].

On June 25, 1965, appellant was sentenced to the custody of the Attorney General for seven years on each of the five counts, with the sentences to begin and run concurrently [C. T. 17].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231, Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4705(a) and 7237. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 174 of Title 21, United States Code, provides in pertinent part as follows:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law" shall be guilty of an offense.

Section 4705(a) of Title 26, United States Code, provides in pertinent part as follows:

". . . it shall be unlawful for any person

to sell, . . . narcotic drugs except in pursuance of a written order of the person to whom such article is sold . . . on a form to be issued in blank for that purpose by the Secretary or his delegate. "

III

STATEMENT OF THE CASE

Appellant was indicted on January 20, 1965, by the Federal Grand Jury for the Southern District of California, Central Division. Counts One and Four of the five-count indictment charged that the appellant knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 24.400 grams of heroin on October 29, 1964, and 38.210 grams of heroin on December 3, 1964, respectively. Counts Two and Five of the indictment charged that the appellant knowingly and unlawfully sold and facilitated the sale of the aforementioned heroin on the said dates. Count Three of the indictment charged that the appellant knowingly and unlawfully sold 19.880 grams of cocaine on October 29, 1964, without obtaining from the purchaser a written order on a form issued for that purpose by the Secretary of the Treasury [C. T. 2].

Trial by jury was held on June 23, 24 and 25, 1965, before the Honorable Charles H. Carr, United States District Judge, at which time the appellant was convicted [C. T. 16].



On June 25, 1965, appellant was sentenced to the custody of the Attorney General for seven years on each of the five counts, with the sentences on Counts Two, Three, Four and Five to begin and run concurrently with the sentence on Count One [C. T. 17].

Appellant filed a timely notice of appeal on June 25, 1965 [C. T. 18].

IV

STATEMENT OF FACTS

Charles R. McConnell, a Federal Bureau of Narcotics agent for 16 years, was called as a Government witness and testified as follows:

On October 29, 1964, at approximately 1:00 P. M., he was in a shop on Adams Boulevard in Los Angeles with an informant by the name of Benjamin Clark and was working in an undercover capacity. The informant received a telephone call from someone, and McConnell heard the informant say, "Hello, I have been expecting you. I have the balance of the money I owe you. I also have a new customer for you. Bring a couple of those things over when you come. How long will it take?" [R. T. 57, 58, lines 17-20]. ^{2/}

At approximately 1:30 P. M., on the same day the defendant arrived in a car which he parked in front of the shop [R. T. 58].

^{2/} "R. T." refers to Reporter's Transcript.

The defendant got out of the car and the informant went outside and shook hands with him. The informant came back into the shop with the defendant and introduced the defendant to Agent McConnell. The agent was using the name "Mac". The agent shook hands with the defendant and the three people walked to a bedroom in the rear of the store. Agent McConnell then asked the defendant what kind of a deal he could make the agent. The defendant replied, "What do you have in mind?" [R. T. 59]. The agent then said, "I could use either coke or H" [R. T. 59].

The defendant then called the informant aside and they had a conversation out of the agent's hearing. The defendant then left the shop and went outside. He returned a short time later and produced a number of rubber contraceptives and told the agent they contained good cocaine [R. T. 60]. The agent asked the defendant how much he wanted for the cocaine; the defendant said \$1,100.00 an ounce. The agent and the defendant haggled about the price, and the defendant agreed to \$550.00 an ounce. The defendant then produced two more rubber contraceptives which he said contained two ounces each of heroin [R. T. 60]. Agent McConnell told the defendant he would take one ounce of heroin and asked how much it would cost. The defendant said he would let the agent have one ounce of heroin and one ounce of cocaine for a total of \$1,100.00. The defendant then sent the informant to the store to obtain more rubber contraceptives. When the informant returned, the defendant counted out 16 spoons of heroin and placed it in a rubber contraceptive which he then handed to Agent McConnell [R. T. 60].

The defendant produced what he said was four ounces of heroin and also five or six rubber contraceptives which allegedly contained one ounce of coke, or cocaine, each.

After the defendant gave Agent McConnell two rubber contraceptives, one allegedly containing heroin and the other containing cocaine, the agent counted out \$1,100.00 to the defendant, which money was official advance funds obtained from the Bureau of Narcotics. The agent and the defendant then exchanged telephone numbers. The agent gave the defendant his home number in San Francisco, and the defendant gave a number in Los Angeles. Agent McConnell told the defendant he would be in touch with him. The defendant thereafter left the shop. Agent McConnell indicated that the serial numbers of the official advance funds had been recorded on a sheet at the Bureau of Narcotics office [R. T. 62-63]. It was stipulated that the goods sold contained heroin and cocaine [R. T. 55-56]. Agent McConnell did not give the defendant any written order form when he purchased the cocaine [R. T. 65].

On December 2, 1964, Agent McConnell called the defendant at the telephone number given to him by the defendant on October 29, 1964. The agent left a message that "Mac" had called. In the early morning hours of December 3, 1964, the defendant returned the agent's call. Agent McConnell asked the defendant if he had any cocaine. The defendant replied that he did, and that he had some fairly good heroin. The agent then indicated that he would be in Los Angeles later that day and would call the defendant

[R. T. 65, 67].

At approximately 3:30 P.M., on December 3, 1964, the agent called the defendant's telephone number from Norm's Restaurant at Sunset and Vermont in Los Angeles and left a message indicating the telephone number of the public booth he was calling from. A short time later the defendant called the agent at the public booth. The defendant told the agent to stay at the restaurant and the defendant would come there and pick him up in 20 minutes. The defendant came to Norm's Restaurant and picked up the agent. The defendant then drove to the vicinity of 750 North Wilcox in Los Angeles and parked in front of 750 North Wilcox. Agent McConnell told the defendant he would take two ounces of heroin. The defendant said that he had only cut heroin and told the agent, "I will let you have them both for \$700.00" [R. T. 68]. The agent agreed, and the defendant got out of the car and went across the street to 747 Wilcox. The agent waited in the car. The defendant came back to the car and gave the agent a Tareyton cigarette package containing two rubber contraceptives containing heroin. The agent gave the defendant \$700.00. The defendant then drove the car around the block and let the agent out [R. T. 69-70].

On the evening of December 13, 1964, Agent McConnell called the defendant's telephone number in Los Angeles and left a message that he had called. At approximately 1:30 A.M. on December 14, 1964, the defendant returned the agent's call. The agent told the defendant he could use ten ounces of heroin. The defendant replied that he could sell the agent eight ounces for

\$2,700.00. The agent agreed and arranged to meet the defendant at 3:00 P.M. that day at the Los Angeles International Airport [R. T. 72-74].

On cross-examination Agent McConnell testified that he had been with the Bureau of Narcotics for 16 years and it was definitely not the practice of the Bureau to offer some type of leniency should the defendant arrange an arrest of another prospective defendant [R. T. 87]. The agent testified that he met the informant when he was called into the case by another narcotics agent; that he talked to the informant on October 28, 1964, and the informant said he had been buying narcotics from the defendant for quite some time. The informant told Agent McConnell that he did not think he would have any difficulty in introducing an agent to the defendant [R. T. 94-96]. The informant told Agent McConnell that as of October 28, 1964, he owed the defendant some money from a prior narcotic transaction [R. T. 96]. The agent said there was no conversation between the informant and himself regarding the informant's gaining some advantage from informing on the defendant [R. T. 79].

Francis L. Briggs, a Federal Bureau of Narcotics Agent for six years, was called as a witness by the Government and testified as follows:

On October 29, 1964, at approximately 1:00 P.M., he was located near the shop on Adams Boulevard in Los Angeles mentioned in the testimony of Agent McConnell. Agent Briggs saw the defendant arrive at the Adams Boulevard shop at



approximately 1:40 P. M. and then go into the shop. A short time later Agent Briggs observed the defendant come from the shop, go to his (the defendant's) car, open the passenger's door and stoop down in the front seat of the car. The defendant then stood up and went back into the shop where he remained until approximately 2:10 P. M., at which time he came out and got back in his car and drove away [R. T. 103-104].

On December 3, 1964, at approximately 3:25 P. M., Agent Briggs was in surveillance of Norm's Restaurant in the vicinity of Sunset and Vermont in Los Angeles. He observed the defendant arrive and park in front of the restaurant in a white, 1965 Ford, shortly before 4:00 P. M. The defendant got out of the car and went into the restaurant and sat down at a table with Agent McConnell. About ten minutes later the defendant and Agent McConnell left the restaurant, got into the defendant's automobile and the defendant drove to the 700 block of North Wilcox in Los Angeles where the defendant got out of the car and went into an apartment building at 747 North Wilcox. A short time later the defendant returned to the automobile and the vehicle became mobile. A few minutes later Agent Briggs met Agent McConnell who entered his vehicle and displayed a Tareyton cigarette package containing two rubber contraceptives which contained heroin [R. T. 105-107].

Agent Briggs identified a \$50 bill which was part of the official advance funds used by Agent McConnell to purchase narcotics from the defendant on October 29, 1964, and which \$50

bill was taken from the defendant at the scene of his arrest on December 14, 1964 [R. T. 107-115].

On cross examination Agent Briggs testified it was not the custom of the Bureau of Narcotics to offer leniency to defendants who became informants and that he did not make an offer of immunity in connection with this case [R. T. 117-118].

After the testimony of Agent Briggs the Government rested its case [R. T. 125].

Ben Clark, the informant, was called as a witness by the defense and testified as follows:

That he had been convicted about four times on marihuana charges [R. T. 138]. That one Claiborne White introduced the informant to the defendant in the latter part of 1964; the informant did not recall the month [R. T. 140-141]. The informant admitted introducing the defendant to federal officers, but denied that he ever received any pay or benefits from the officers. The informant testified that after meeting the defendant he made several narcotics transactions with him. On October 29, he still owed the defendant payment for these purchases [R. T. 142-144]. At the time of the meeting between the defendant, the informant and Agent McConnell in October, 1964, the defendant wanted to collect the money that the informant owed him. The informant agreed to pay as much as he had, and also asked the defendant if he had any heroin or cocaine to sell as Agent McConnell wanted to purchase some [R. T. 144]. The informant stated that he did not ask the defendant to sell narcotics to anyone, he only asked if the

defendant had anything to sell [R. T. 147]. The informant testified that the defendant always sold narcotics to him and that he never had any narcotics to sell to the defendant [R. T. 149].

The defendant, Raymond Ronald Fowle, testified as follows:

While at the home of Claiborne White, the defendant was told by White that the informant, Clark, was in some trouble concerning narcotics and if the informant could set someone up, the charge against him would be dropped. White said the informant needed someone to help him to set up some other people [R. T. 166]. Three or four days later, the informant and White came to the defendant's apartment to further discuss the informant's problem and to ask the defendant to assist the informant in setting someone up.

The defendant testified that the arrangement was for the defendant to receive the narcotics from the informant; the defendant would then sell the narcotics to Mac (Agent McConnell) and receive the money and give it to the informant; Mac would be arrested and the charge against the informant would be dropped. The defendant said he was then going to be a witness of the sale to Mac [R. T. 174]. The defendant testified he told the informant that he would be unable to get any narcotics. He said the informant told him that he would be able to furnish it [R. T. 174]. The defendant said the informant told him to act as if he were a big pusher and to pretend like he had many connections and that he was getting the narcotics from Mexico [R. T. 174-175]. The defendant

admitted passing the heroin and cocaine to Agent McConnell on October 29, 1964, but claimed he received the narcotics from the informant the previous day after the informant called him [R. T. 177-180]. The defendant said the informant told him how much to ask for the narcotics [R. T. 185].

The defendant testified that after he was contacted by Agent McConnell on December 2, 1964, he contacted the informant and said he needed two ounces of heroin. The defendant stated that the informant was in the Wilcox Street apartment and gave the defendant the heroin when he went there with Agent McConnell the afternoon of December 3, 1964 [R. T. 191-192].

The defendant stated he gave the money received from Agent McConnell to the informant after each sale and that after the transaction on October 29, 1964, the informant gave him \$75.00 of the money for his part in the transaction [R. T. 174]. The defendant did not see or talk to the informant after December 3, 1964 [R. T. 195]. The defendant testified that the \$1,082.00 found on him at the time of his arrest on December 14, 1964, was obtained from the sale of milk sugar, as heroin, to someone else the same day. Among the money was \$50.00 of the money that the defendant had received from Agent McConnell on October 29, 1964, and given to the informant. The defendant testified he did not have the heroin to sell on December 14, 1964, because he could not contact the informant to get more [R. T. 198-202]. The defendant denied ever selling narcotics to the informant [R. T. 212].

The defendant testified that on May 10, 1965, he had a

discussion with federal narcotics officers in their office regarding the possibility of his obtaining leniency if he would introduce the federal agents to a possible defendant [R. T. 213].

On cross-examination the defendant stated that on October 29, 1964, he had known the informant approximately one month and that the informant owed him \$800 because he had given money to the informant to obtain cocaine for him and the informant reneged. The defendant testified that he did not call the informant at the Adams Boulevard shop on October 29, 1964, but that the informant called him [R. T. 217-219].

The defendant stated that on December 3, 1964, he was residing at 1308 Poinsettia in Los Angeles, but that on the same date he was renting the apartment at 747 North Wilcox under the name of Robert Juan. He denied the Wilcox apartment was being used as a "stash pad" (a place for storing narcotics or stolen goods) [R. T. 216].

The defendant stated that on October 29, 1964 and December 3, 1964, he understood that the informant was working with law enforcement officers and that he was assisting the informant in working with officers [R. T. 219-221]. The defendant testified that at no time did he meet or talk with any officers or other law enforcement people either before October 29, 1964, or between October 29, 1964 and the date of his arrest on December 14, 1964 [R. T. 221-222].

The defendant stated that the heroin and cocaine he sold to Agent McConnell on October 29, 1964, he obtained from the

informant and that he had no other source for cocaine at that time nor did he have any other source for heroin. The defendant said he had no source, other than the informant, for the heroin sold to Agent McConnell on December 3, 1964 [R. T. 222-223].

The defendant testified that the sales of narcotics on October 29 and December 3, 1964, were the only sales of narcotics he made between the beginning of October and the end of December, 1964 [R. T. 223-224].

The defendant stated that at the time of his arrest on December 14, 1964, he was advised that he was arrested for selling narcotics, and at that time he realized he had not been working with law enforcement officials on the sales to Agent McConnell on October 29 and December 3, 1964, but that he had been set up [R. T. 224-225]. The defendant was then cross-examined as follows:

"Q. . . . At the time of your arrest, Mr. Fowle, did you tell the agents that you were setting up Mac with Mr. Clark?

"A. No, I didn't." [R. T. 228].

The defendant was then asked:

"Q. Mr. Fowle, isn't it a fact that on December the 15th of 1964, when you were no longer in custody, that you told Agent Briggs and Saiz that David Soto Vasquez was your main connection in Tijuana?

"A. Not to my recollection.

* * * * *

"Q. Now isn't it a fact, Mr. Fowle, that subsequent to November of 1964 you sold narcotics to a man named Roger Angel?

"A. Roger Angel, no.

* * * * *

"Q. Isn't it a fact, Mr. Fowle, that you told Mr. Hess, seated here in court (indicating), on February the 3rd of 1965 that you had sold narcotics to Roger Angel after November of 1964?

"A. No." [R. T. 229-230].

The defendant testified that the agents returned to him part of the money that was taken from his person at the time of his arrest, and that he used the money to bail himself from jail [R. T. 225-226].

The defendant was cross-examined as follows concerning his being advised, at the time of his arrest, of his constitutional rights:

"Q. On the date of December the 14th of 1964, at the time of your arrest, you were advised by the federal agents that you did not have to say anything, and that anything you said could be used against you, were you not?

"A. Yes, I was.

"Q. On the date of December the 14th, at the time of your arrest, you were also told that you had a right to counsel?

"A. I told them I didn't want to mention anything --"

On redirect examination the defendant testified that he had heard the name Robert Angel when he talked to Special Agent Lawrence Hess of the United States Secret Service about a group of people that were dealing in counterfeit money. The defendant stated, "And it wasn't nothing about narcotics that we were discussing" [R. T. 232, lines 3-4]. The defendant recalled that the conversation took place at a restaurant, but he could not remember the date. The defendant stated that he had previously heard the name David Soto Vasquez during a conversation between Claiborne White, the informant and himself. He could not recall when he had first heard the name. He said that Vasquez was supposed to be a connection in Tijuana and that White and the informant had given him Vasquez's phone number in the event he had to go down there and contact him [R. T. 232-234].

The defense called as witnesses, Joleen Kottman, Violette LeBeau and Hope Kolsiana, all of whom testified to the effect that they were present together at the defendant's apartment on some evening between October 15 and October 29, 1964, that Claiborne White and the informant came to the defendant's apartment while they were present, that they overheard the defendant say to White

and the informant that he did not know how he could help them, that thereafter either White or the informant said, "I can get it for you, don't worry about where you get it" [R. T. 244]. "I got the stuff" [R. T. 262, 237-280]. Joleen Kottman also testified that around May 10, 1965, she was with the defendant in the office of the Bureau of Narcotics when she heard Agent Briggs say to the defendant, "I don't want any more foolishness and it had to be bona fide information or help" [R. T. 248].

The informant, Ben Clark, was recalled as a witness by the defense and admitted going to the defendant's apartment with Claiborne White. He stated that he went there only once, and it was before October 29, 1964. The informant stated that neither Joleen Kottman, Violette LeBeau nor Hope Kolsiana was present at the defendant's apartment on that occasion. The informant said he went to the defendant's apartment at the defendant's invitation. The informant stated that he did not tell the defendant that he was in trouble with the law when he went to the defendant's apartment. The informant stated that he had not talked to federal agents prior to meeting at the defendant's apartment [R. T. 283-295].

On cross-examination the informant denied that he ever asked the defendant to help him set up anyone [R. T. 297].

On redirect examination the informant stated that the narcotics he bought from the defendant he sold to other people [R. T. 300].

Agent Briggs was called as a defense witness and stated that the first time he ever talked to the informant was on the

evening of October 28, 1964. Agent Briggs testified on cross-examination that the informant was arrested on October 26, 1964 [R. T. 301-302].

The defense rested its case after the testimony of Agent Briggs [R. T. 304].

In rebuttal, the Government called Lawrence Hess who identified himself as a special agent with the United States Secret Service in Los Angeles and testified that he met the defendant at a coffee shop in the Hollywood area on February 3, 1965, where the defendant introduced him to a man named Norman Sugarman, whom the defendant said was his attorney. Agent Hess then had a conversation with the defendant; however, the attorney was not present at that time [R. T. 304-306]. Before allowing Agent Hess to testify as to statements made to him by the defendant, the court questioned the agent as follows:

"THE COURT: First, were you assigned to investigate the case?

"THE WITNESS: Not regarding narcotics, sir.

"THE COURT: I see. Two: Was the defendant under arrest at that time?

"THE WITNESS: No, sir.

"THE COURT: Was the defendant charged at that time?

"THE WITNESS: No, sir.

"THE COURT: As far as you know.

"THE WITNESS: No. "

Thereafter, Agent Hess testified that on February 3, 1965, the defendant told him that in November of 1964 he had sold narcotics to Roger Angel [R. T. 306-307].

On cross-examination Agent Hess testified that his investigation of the defendant was in connection with his duties as a Secret Service Agent and had nothing to do with narcotics. His investigation was concerning the defendant's possible involvement with counterfeit money [R. T. 308-309].

In rebuttal, the Government recalled Agent Briggs who testified that he talked to the defendant on December 15, 1964, which was subsequent to his arrest and arraignment before the Commissioner and subsequent to his release on bond. The conversation with defendant was held in the office of the Federal Bureau of Narcotics in Los Angeles. Agent Briggs testified that the defendant told him on December 15, 1964, that David Soto Vasquez was his main source or connection and that Vasquez was in Tijuana [R. T. 312-313].

ARGUMENT

- A. THE TRIAL COURT DID NOT ERR IN PERMITTING THE PROSECUTION TO INTERROGATE THE DEFENDANT AS TO WHETHER, AT THE TIME OF HIS ARREST, HE TOLD THE FEDERAL AGENTS THAT HE WAS WORKING WITH THEM TO SET UP SOMEONE.
-

As his defense, the defendant sought to establish that he had been unlawfully entrapped, or more accurately, framed into selling narcotics to a Federal Agent on October 29, 1964, and December 3, 1964. The defendant testified that the informant had come to him and explained he was in trouble involving narcotics and needed someone to help him set up a third person in order to get the charge against him dismissed [R. T. 166, 172]. The defendant testified that he agreed to help the informant. The arrangement was for the defendant to receive narcotics from the informant and sell them to a third party; thereafter the defendant would give the money received from the purchaser to the informant. The defendant stated that as a part of the arrangement the purchaser would be arrested and the charge against the informant would be dismissed. The defendant was then supposed to be a prosecution witness against the purchaser [R. T. 174]. The defendant testified that he understood the informant was working with law enforcement officers and that he was assisting the informant in working with the officers [R. T. 219-221]. Thereafter, the prosecution, over defense



counsel's objection asked the defendant whether at the time of his arrest, he told the federal agents that he was working with them in attempting to set up someone. The defendant replied that he did not [R. T. 228]. The defense claims on appeal that the trial court erred in allowing the question to be asked.

It is very clear that the prosecution's purpose in asking the defendant the indicated question was solely for impeachment of the defendant's story as to entrapment or being framed. To conclude that a person would not be totally shocked and dismayed if he were arrested by law enforcement officers who he thought he was working with, and would not attempt to communicate to the officers that he was working with them, flies in the face of reason. Clearly, the inference to be drawn from the objected to question and answer was that the defendant's story of entrapment was a fabrication.

Appellee is mindful of the defendant's right to remain silent when under arrest without making an express claim of his privilege against self-incrimination. Appellee is also aware of the impropriety of comment by the prosecution that the defendant has elected to remain silent. Griffin v. California, 380 U.S. 609 (1965). However, defendant's admitted silence at the time of his arrest was not introduced by the prosecution to suggest that the defendant must be guilty of the charges against him, otherwise he would not have remained silent upon arrest. Rather, the fact of defendant's silence at the time of his arrest was introduced entirely for the purpose of suggesting that if defendant's lengthy testimony

of helping law enforcement officers by setting up another person was true, he would certainly have expressed this fact to the officers at the time of his arrest.

Appellee maintains that the arrest of the defendant was so accusatory as to compel a statement from the defendant at that time that he was working with law enforcement officers. The prosecution's questioning of the defendant as to his silence at the time of his arrest strongly suggests that the defendant's defense was sheer fabrication.

B. THE TRIAL COURT DID NOT ERR
IN PERMITTING AGENT BRIGGS TO
TESTIFY CONCERNING HIS CON-
VERSATION WITH THE DEFENDANT
ON DECEMBER 15, 1964.

On direct examination by his counsel, the defendant testified that when Claiborne White and the informant came to his apartment prior to October 29, 1964, the defendant allegedly told the informant that he would be unable to get any narcotics. The defendant testified that the informant told him he would be able to furnish it. The defendant said the informant told him to pretend as if he had many connections and that he was getting the narcotics from Mexico [R. T. 174-175]. The defendant admitted passing narcotics to Agent McConnell on October 29 and December 3, 1964, but claimed that he received the narcotics from the informant. The defendant alleged that this was all part of a plan whereby he was to help the informant in working with law enforcement officers.

On cross-examination the defendant repeated his claim that he had no source for narcotics other than the informant [R. T. 222-223]. The defendant testified on cross that he did not recollect telling Agent Briggs, on December 15, 1964, that David Soto Vasquez was his main source [R. T. 228].

The clear import of the cross-examination was to impeach the defendant's testimony that he had no source of narcotics other than the informant. By calling Agent Briggs on rebuttal to testify that the defendant had stated to him that David Soto Vasquez was his main source, the prosecution was not only seeking to impeach the defendant's denial of having made the statement, but also to impeach the credibility of his whole story on direct examination concerning entrapment or frame-up.

Furthermore, the defendant is precluded from objecting to penetrating inquiry into his conduct when he has raised the issue of entrapment.

" . . . if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense. "

Sorrell v. United States, 287 U.S. 435, 451 (1932).



"When the defense of entrapment is entered, the predisposition and criminal design of the defendant becomes relevant and the government may introduce evidence relating to the conduct and the predisposition of the defendant as it bears upon the issue of entrapment. The record and the reputation of the defendant became important upon this issue in rebuttal.

Ryles v. United States, 183 F.2d 944

(10th Cir. 1950), cert. denied 340 U.S. 877.

It is contended that the language of the above-cited cases applies with equal logic to the situation where, as here, the defendant has raised the issue of frameup.

C. THE TRIAL COURT DID NOT ERR
IN PERMITTING AGENT HESS TO
TESTIFY CONCERNING HIS CON-
VERSATION WITH THE DEFENDANT
ON FEBRUARY 3, 1965.

On cross-examination the defendant testified that the sales of narcotics on October 29 and December 3, 1964, were the only sales of narcotics he made between the beginning of October and the end of December, 1964 [R. T. 223-224]. The defendant subsequently denied that he had sold narcotics in November, 1964, to a man named Roger Angel. The defendant further denied that he told Agent Hess on February 3, 1965, that he had sold narcotics to Roger Angel in November, 1964. No objections were made by



defense counsel to this questioning of the defendant [R. T. 229-230].

In rebuttal, the Government called Lawrence Hess, a special agent with the United States Secret Service, who testified that on February 3, 1965, he had a conversation with the defendant in which the defendant told him that he had sold narcotics to Roger Angel in November, 1964 [R. T. 306-307].

The prosecution's purpose in introducing the testimony of Agent Hess was clearly to impeach the defendant's denials on cross. The impeachment of the defendant's denials concerning the sale of narcotics to Roger Angel in November, 1964 would obviously attack the credibility of the defendant's story concerning entrapment. If the jury did believe the testimony of Agent Hess concerning his conversation with the defendant, they could find that the defendant lied not only as to having made the sale to Roger Angel, but also concerning his alleged relationship with the informant whereby the informant supplied him with the narcotics to make the sales on October 29 and December 3, 1964. In accepting the testimony of Agent Hess, the jury could discredit the testimony of the defendant that he was not disposed to sell narcotics except for the inducement by the informant.

As indicated in Section B hereinabove, since the defendant raised the issue of entrapment, or possibly frameup, he cannot object to searching inquiry concerning his own conduct and predisposition. See the language of Sorrell v. United States, supra, and Ryles v. United States, supra, quoted hereinabove.



D. THE ADMISSION OF DEFENDANT'S
STATEMENTS TO AGENT BRIGGS
AND TO AGENT HESS WAS NOT
MADE IN VIOLATION OF DEFEND-
ANT'S CONSTITUTIONAL RIGHTS.

The trial of the defendant took place in June, 1965. There-
fore, Miranda v. State of Arizona, 384 U.S. 436, is not applicable.

Johnson v. State of New Jersey, 384 U.S. 719.

The defendant's conversation with Agent Briggs occurred
after the defendant had been arraigned and released on bond. The
defendant was not in custody at the time of the conversation [R. T.
229, 312-313]. Furthermore, there is no showing in the record
that the defendant ever asked for or was denied the assistance of
counsel at the time of his conversation with Agent Briggs.

The admission of the defendant's conversation with Agent
Briggs did not violate his sixth amendment right to counsel as
expressed in Escobedo v. Illinois, 378 U.S. 478.

The defendant's conversation with Agent Hess on February 3,
1965 occurred while the defendant was at liberty on bond. The
defendant himself testified that the conversation with Agent Hess
was about people who were dealing in counterfeit money. The
defendant stated, "And it wasn't nothing about narcotics that we
were discussing" [R. T. 232]. Agent Hess testified that at the time of
his conversation with the defendant, he was not assigned to the
investigation of the narcotics charges pending against the defendant.
He stated that the defendant was neither under arrest nor charged at
the time of the conversation. His investigation concerned the

defendant's possible involvement with counterfeit money [R. T. 306-309]. Agent Hess testified that he was introduced to defendant's attorney at the time of the conversation, but that the attorney was not present during the conversation. There is no showing in the record that defendant was denied the assistance of his counsel at the time of the conversation. The fact that the defendant was advised of his right to counsel at the time of his arrest [R. T. 226], and the fact that defendant's attorney was present immediately before his conversation with Agent Hess gives rise to the inference that the defendant was fully aware of his constitutional rights at the time of the conversation.

The admission of the defendant's conversation with Agent Hess, as in the case of his conversation with Agent Briggs, did not violate his sixth amendment right to counsel.

E. THE DEFENDANT'S OBJECTION TO THE LANGUAGE USED IN THE TRIAL COURT'S INSTRUCTION ON ENTRAPMENT IS NOT PROPERLY RAISED ON APPEAL.

The instruction on the law of entrapment was based substantially upon "Jury Instructions and Forms for Federal Criminal Cases", by the Honorable William C. Mathes [R. T. 407-408].

It is recognized that the decision of this Court in Notaro v. United States, 362 F.2d 169, has resulted in a modification of that instruction in order to properly cast the burden of proof on the prosecution. However, the objection raised in Notaro, supra, was

not raised in the trial of the instant case, nor has the objection been raised on appeal; therefore, the correctness of the trial court's instruction in that regard is not before this Court on appeal.

Robison v. United States, ____ F.2d ____,

decided May 18, 1967 (9th Cir.)

Docket No. 20,752;

Rule 30, Federal Rules of Criminal Procedure.

During the trial, the defense raised an objection to the first paragraph of the entrapment instruction wherein the trial court instructed as follows:

"Where a person has no previous intent or purpose to violate the law, but is induced or is persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case." [R. T. 407].

The defendant's objection at trial was that the paragraph should have stated the lack of intent to commit the crime charged in the indictment, not simply the lack of intent to violate the law. On appeal, however, the defense raises for the first time an objection to the language used in the fifth paragraph of the instruction wherein the trial instructed as follows:

"If on the other hand the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so, only because he was induced or persuaded

by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused." [R. T. 408].

Therefore, the defendant's objection on appeal to the language of the entrapment instruction is not timely and is precluded by Rule 30, Federal Rules of Criminal Procedure.

Johnson v. United States, 291 F.2d 150

(C. A. 8th 1961);

Reid v. United States, 334 F.2d 915

(C. A. 9th, 1964).

Johnson, supra, at page 156, states as follows:

"Rule 30, Federal Rules of Criminal Procedure, 18 U. S. C. A. , provides in part:

" 'No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. ' "

"The purpose of the quoted portion of the rule is to give the trial judge a fair opportunity to correct any mistakes in his charge. An exception which does not fulfill this purpose does not entitle the party to a review of the instruction. "

In the absence of plain error, failure to object to the alleged defect in the court's instruction at trial forecloses the defendant's right to object thereto on appeal.

Phillips v. United States, 334 F.2d 589

(9th Cir. 1964), cert. denied 379 U.S. 1002;

Renteria-Medina v. United States, 346 F.2d 853

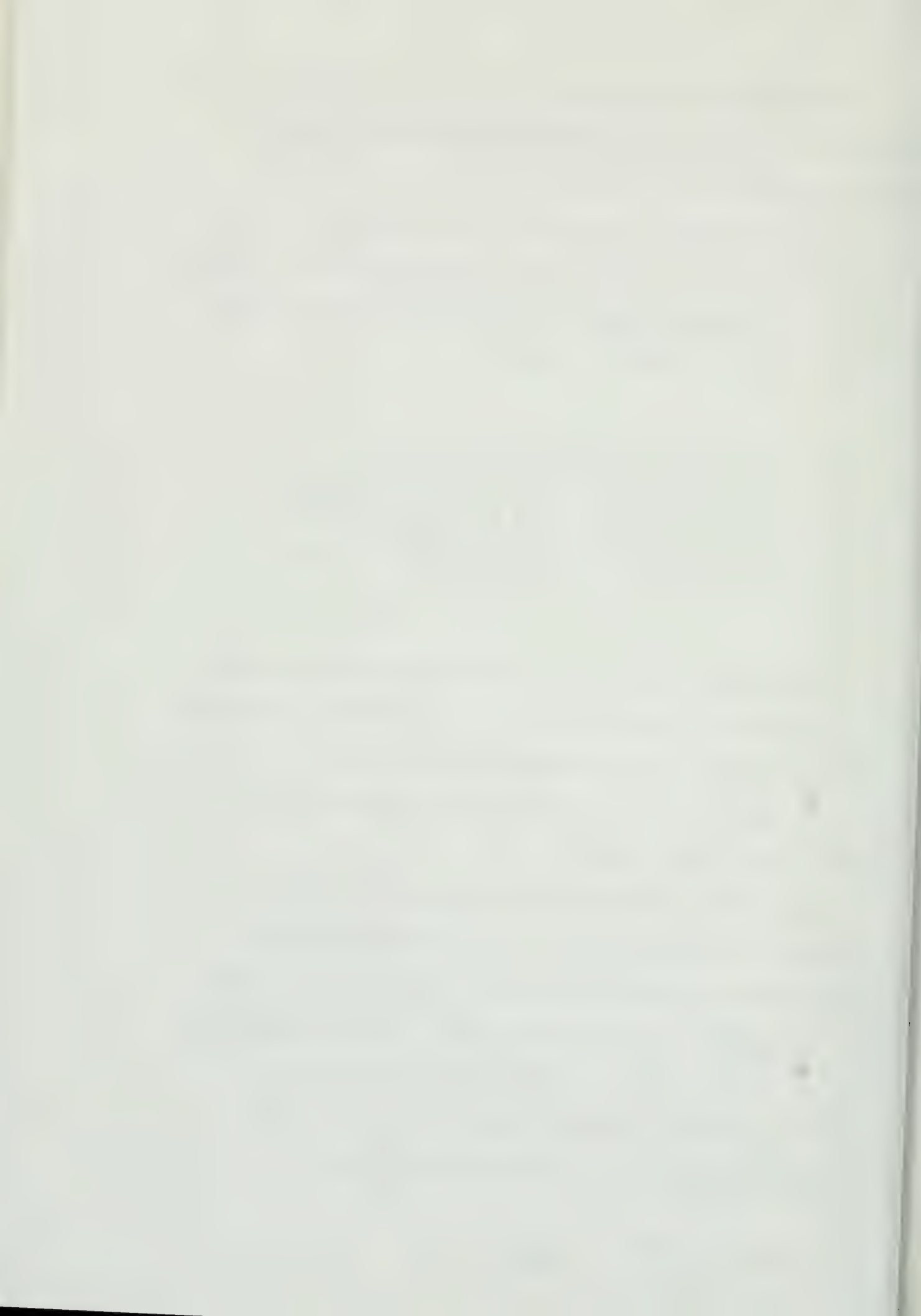
(9th Cir. 1965).

F. ASSUMING ARGUENDO, A DEFECT
IN THE TRIAL COURT'S INSTRU-
TION ON THE LAW OF ENTRAPMENT,
SAID DEFECT DOES NOT CONSTITUTE
PLAIN ERROR AS EXPRESSED IN
RULE 52(b) OF THE FEDERAL RULES
OF CRIMINAL PROCEDURE.

At the time defendant requested an instruction on entrapment the trial court agreed to give such an instruction, but stated to defense counsel, "This is not an entrapment case, if I ever saw one This is as far from being an entrapment case as I have ever seen." [R. T. 331].

In his defense, the defendant testified that he knew that the informant was working with law enforcement officers on October 29 and December 3, 1964 [R. T. 219-221]. As stated in Reid v. United States, 334 F.2d 915 (9th Cir. 1964) at page 916:

"It is difficult to understand how one could be 'entrapped' by another known by him at the time to be working with law enforcement officers."



In the defendant's defense, he did not admit the commission of the crime. Rather, his defense was to the effect of claiming "frameup". By the defendant's own testimony he stated that he knew the informant was working with law enforcement officers on the dates of the sales to Agent McConnell, and that he was assisting the informant in working with the officers. What the defendant said, in effect, was that the sales made by him on October 29, and December 3, 1964, were not crimes at all, but were activities in furtherance of an arrangement with law enforcement officers to set up prospective defendants. Under such a state of facts, the trial court properly could have denied defendant's request for an instruction on entrapment.

Absent the defendant's admission of a crime, there can be no entrapment.

Ortega v. United States, 348 F.2d 874

(9th Cir. 1965);

Ortiz v. United States, 358 F.2d 107

(9th Cir. 1966);

Garibay-Garcia v. United States, 362 F.2d 509

(9th Cir. 1966).

VI

CONCLUSION

For the reasons stated herein, the judgment should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

JAMES E. SHEKOYAN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James E. Shekoyan

JAMES E. SHEKOYAN

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DAVID WILBUR POWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21076 ✓

On Appeal from
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

RICHARD C. GORMLEY
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

FILED

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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DAVID WILBUR POWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21076

On Appeal from
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

**I.
JURISDICTIONAL STATEMENT OF FACTS**

This action was commenced by the return and filing of an Indictment by the Federal Grand Jury of the District of Arizona sitting at Tucson, Arizona, on November 16, 1965, charging David Wilbur Powell, the Appellant herein, with a violation of 21 U.S.C., §174, in that he did import and bring into the United States of America from the United States of Mexico, at Nogales, Arizona, contrary to law, approximately one and six-tenths (1.6) grams of heroin, a narcotic drug, on or about

the 13th day of October, 1965. (The transcript of the record will be referred to as "RC," the reporter's transcript of the testimony will be referred to as "RT," the number following "RT" will be the page of the transcript, and the number following "L" will be the line.) (RC, Item 1.)

On November 22, 1965, the Appellant was arraigned and was appointed counsel (RC, Item 12).

On December 7, 1965, Appellant filed a Motion to Reduce Bail (RC, Item 2). On December 8, 1965, the Government filed a Memorandum in Opposition (RC, Item 3). On December 13, 1965, a hearing was held and the Motion was denied. (RC, Item 12.)

On December 16, 1965, Appellant filed a Motion to Disclose Identity of Informer (RC, Item 4). On December 17, 1965, a Memorandum in Opposition was filed by the Government (RC, Item 5). On December 20, 1965, a hearing was held and the Motion was denied (RC, Item 12).

On December 29, 1965, trial was held and a verdict of guilty was returned by the Jury (RC, Items 6 and 12).

On January 3, 1966, the Court entered a judgment of conviction and sentenced Appellant to five years' imprisonment (RC, Item 7).

On January 12, 1966, Appellant filed a Notice of Appeal and Motion to Proceed in Forma Pauperis (RC, Items 8 and 9).

On April 22, 1966, the Court entered an Order Denying Certificate for Probable Cause for Appeal (RC, Item 10).

On June 24, 1966, the Circuit Court of Appeals for the

Ninth Circuit entered an Order Permitting Appellant to Appeal in Forma Pauperis.

This is an appeal pursuant to 28 U.S.C., §1291.

II.

STATEMENT OF FACTS

On October 13, 1965, at approximately 4:00 p.m., Henry Washington, a Customs Port Investigator, received information or tip and as a result of that information went into Nogales, Sonora, Mexico, and saw Appellant and Robert Jackson driving south as he, Washington, was going North (RT 96, L 4-10). Washington turned in about six or seven blocks and drove to the home of Ninni Abreu where he saw the blue Simca with California license plates parked with Robert Jackson in the car and Appellant standing in the yard of Abreu's house (RT 96, L 10-20; RT 98, L 5). The Appellant stood there about five or ten minutes and a man known to Washington came out of the house and Appellant and the man entered the Simca and drove off (RT 96, L 20-25). The man with Appellant was known to Washington as El Negro, but whose real name, Washington believes, is Tony Vallegas (RT 97, L 25, to RT 98, L 1).

Washington placed a lookout at the Nogales Port of Entry (RT 101, L 5-6).

At about 8:15 p.m. on October 13, 1965, William Searcy was at the Grand Avenue Port of Entry at Nogales, Arizona, when Appellant entered the United States from Mexico in a blue Simca automobile as a passenger with Robert Jackson driving (RT 10, L 7—RT 11, L 24). The Simca was directed to the area for secondary examination and the occupants were

asked for declarations by Searcy, and they both had nothing to declare (RT 11, L 22 to RT 12, L 4). Searcy phoned Washington, left Appellant and Jackson with Customs Inspector Rankin and searched the Simca (RT 12, L 5-10). Washington arrived, and Searcy and Washington searched Jackson in the search room and then called Appellant into the search room (RT 12, L 10-12 and RT 31, L 17-20). Washington asked Appellant to remove his personal belongings and Appellant reached for a cigarette package which Washington took from him (RT 12, L 13-14 and RT 30, L 16-20).

Washington looked into the package of Pall Mall cigarettes and saw a small, folded piece of white paper containing a powderish brown substance (RT 12, L 14-15 and RT 30, L 21-24). Searcy was sent for a Marquis Reagent field test and tested the contents, and the results were positive (RT 12, L 16-17; RT 30, L 24 to RT 31, L 1). Appellant was placed under arrest (RT 12, L 17-18 and RT 31, L 1-2). Washington ripped open the cigarette package and found three more papers inside, and Washington then arrested Jackson (RT 31, L 7-11).

Appellant and Jackson both testified they entered Nogales, Sonora, Mexico, on October 13, 1965, about noon (RT 59, L 16-20, and RT 79, L 1-4). Appellant and Jackson met a man on the street selling jewelry who was going to show them where to buy marihuana (RT 64, L 11-14; RT 80, L 2-3; RT 82, L 18). Appellant gave the man a pack of Pall Mall cigarettes and money, but when the man tried to run away from them, Appellant took the money and the cigarettes back (RT 65, L 19 to RT 66, L 3, and RT 80, L 12 to RT 84, L 21).

Appellant and Jackson both testified they then returned to the United States and went to several places trying to cash Jackson's Travelers' checks (RT 67, L 6-15 and RT 85 to RT

86). About six or six-thirty p.m. they returned to Nogales, Sonora, Mexico, went to Canal Street and then returned to the United States at about 8:00 p.m. (RT 68 to 69 and RT 86, L 10-25).

Appellant and Jackson both denied being in Nogales, Sonora, Mexico, after 4:00 p.m. at anyone's home (RT 74 to 75, and RT 91).

The Government offered as impeachment the testimony of Henry Washington, who described his trip into Mexico after 4:00 p.m. the afternoon of October 13, 1965 (RT 95 to RT 101—see opening of the Statement of Facts) and brought out Jackson's two felony convictions (RT 73, L 8-9).

III.

OPPOSITION TO SPECIFICATIONS OF ERROR

1. The Trial Court did not commit reversible error in admitting Government's Exhibits 1 and 1-A, and in denying Appellant's Motion for Judgment of Acquittal, there being a sufficient foundation for these exhibits.

2. The Trial Court did not commit reversible error in admitting Government's Exhibits 1 and 1-A, and in denying Appellant's Motion for Judgment of Acquittal in that the contents were shown to be "heroin," or by its chemical name, "heroin hydrochloride, a derivative of opium."

3. The Trial Court did not commit reversible error in denying Appellant's Motion to Disclose Identity of Informer.

IV.

SUMMARY OF ARGUMENT

1. There was a sufficient foundation laid for the admission of Government's Exhibits 1 and 1-A into evidence.

2. There was sufficient, and uncontroverted, evidence that the contents of Government's Exhibit 1-A contained a narcotic drug.

3. There was no showing of materiality to Appellant's guilt or innocence for the disclosure of the informant, and, further, where the informant is admittedly an observer, and not a participant, the privilege of non-disclosure should be sustained.

V.

ARGUMENT

1. There was a sufficient foundation laid for the admission of Government's Exhibits 1 and 1-A into evidence.

Henry Washington testified he kept the Pall Mall cigarette package and its contents in his possession, after Searcy had put his initials and date on the papers, until he placed the package in the locked strong box of the Customs Agency office to which he had the only key (RT 32, L 2 to RT 33, L 11). The next morning October 14, 1965, he removed it, examined it—it appeared to be the same—and turned it over to Karl Vogt, the Custodian of Seized Merchandise (RT 32, L 25 to RT 33, L 16).

Karl Vogt, the Custodian of Seized Merchandise, weighed the contents of the papers in the cigarette package, Exhibit 1-A,

placed the Pall Mall cigarette package, the cigarettes, and the papers and their contents into Government's Exhibit 1-A, which is an envelope with lock seals, and mailed it by registered mail to the U. S. Customs Laboratory in Los Angeles, California (RT 40, L 19 to RT 41, L 17). On November 29, 1965, he received Government's Exhibit 1-A by registered mail from the chemist (RT 41, L 18-21). Vogt placed Exhibit 1-A in the vault until he withdrew it the morning of trial (RT 41, L 22-25). When he mailed Government's Exhibit 1-A, it was sealed with self-locking devices, and when he received it back it was sealed with masking tape and the red seal (RT 42, L 11-14). The vault into which Vogt placed it has a combination and a key (RT 45, L 15), and Vogt has the only key (RT 45, L 17). The Acting Custodian of Seized Merchandise, Inspector Baker, has the combination (RT 45, L 19 and RT 46, L 22 to RT 47, L 1). Vogt, during the period from November 29, 1965, to the date of trial, December 29, 1965, did not turn the key over to Baker, but Vogt would leave the key overnight sometimes in another safe (RT 47, L 8-10). But when Vogt removed Government's Exhibit 1-A the morning of trial, it appeared to be in the same condition and had not been tampered with (RT 47, L 13-17).

Denzil Curtis testified that he is a United States Customs chemist (RT 48, L 18), and that he received Government's Exhibit 1-A by registered mail in a sealed condition, and it appeared not to have been tampered with (RT 49, L 22 to RT 50, L 7). Curtis received Government's Exhibit 1 on October 15, 1965, and placed it in a vault and removed it on October 26, 1965, when he examined it (RT 54, L 1-4). Curtis opened Government's Exhibit 1 and removed Government's Exhibit 1-A and slit it open where the masking tape now is (RT 50, L 23-25). He tested and weighed the contents and replaced them in Government's Exhibit 1-A and placed the masking tape and the red seal with a stamp-on

inscription reading "L.A., U.S. Customs Laboratory," (RT 50, L 13-20). Curtis completed the examination without leaving it and replaced the contents into the Pall Mall cigarette package and placed that into Government's Exhibit 1-A and placed Government's Exhibit 1-A into Government's Exhibit 1 and mailed it by registered mail to the Nogales Customs office (RT 55, L 7-15).

The record shows that Government's Exhibit 1-A was opened at the trial, in the presence of Appellant's counsel (RT 12, L 21 to RT 13, L 1).

In *Gallego v. United States*, (9th Cir., 1960), 276 F.2d 914, at page 917, this Circuit, quoting from *United States v. Penick and Co.*, (2nd Cir., 1943), 136 F.2d 413, at page 415, held that in establishing the chain of custody, the Government must show that the evidence is substantially in the same condition, and further, that there are no hard and fast rules that the Government must exclude all possibilities that the evidence was tampered with. This Circuit went on in the *Gallego* case to hold that there must be a clear abuse of discretion in admitting the evidence.

In *Brewer v. United States*, (8th Cir., 1965), 353 F.2d 260, page 263, the Court quoted from *Gallego*:

"'In the absence of any evidence to the contrary, the trial judge is entitled to assume that this official would not tamper with the sack and can or their contents. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their duties.' 276 F.2d 914, 917."

It is respectfully submitted there was a chain of custody

shown by the Government, and, that the contents of Government's Exhibit 1-A was shown to be in substantially the same condition at each link in the chain.

2. There was sufficient, and uncontroverted, evidence that the contents of Government's Exhibit 1-A contained a narcotic drug.

On direct examination, Denzil Curtis was asked and answered as follows:

"Q. (by Miss Diamos) All right. And did I ask you what the content of Exhibit 1-A was, the four papers?

"A. I did not state. In my opinion each of the four bindles contained, the powder in them contained heroin hydrochloride, which is a derivative of opium." (RT 52, L 21-25.)

Under 26 U.S.C., §4731(a)(2), "Any compound, manufacture, salt, derivative or preparation of opium, isonipecaine, coca leaves, or opiate;" is a narcotic drug.

Curtis performed ten or eleven tests, including the Marquis Reagent (RT 52, L 2-5). Not all these tests are necessary, but he does them to orient the powder for special purposes (RT 52, L 16-20). The Marquis test was performed by Searcy and was positive (see Statement of Facts).

He did not examine the powder quantitatively because it weighed only one and six-tenths (1.6) grams, or twenty-four (24) grains, and the laboratory has a rule of thumb not to test a substance which weighs less than fifty (50) grains (RT 53, L 10-13).

To argue now that heroin hydrochloride, the chemist's

technical name for heroin, is not heroin, is to strain common sense.

It is respectfully submitted that there was uncontroverted and sufficient evidence for the jury to find that the contents of Government's Exhibit 1-A was heroin, or, to use the technical name—heroin hydrochloride, and, as the Court instructed, was a narcotic drug (RT 132, L 16-17).

3. There was no showing of materiality to Appellant's guilt or innocence for the disclosure of the informant, and, further, where the informant is admittedly an observer, and not a participant, the privilege of non-disclosure should be sustained.

In *Alexander v. United States*, (9th Cir., 1966), 362 F.2d 379, this Court stated at page 383:

"[7] Equally without merit is appellant's further argument that failure to identify or produce the informer at the trial constituted a denial of due process. The informant was admittedly neither a participant in, nor a witness to, the crime charged in the indictment, and of which appellant stands convicted. [See: *Hammond v. United States*, supra, 356 F.2d 931; *Cook v. United States*, 354 F.2d 529 (9th Cir., 1965); *Hurst v. United States*, 344 F.2d 327 (9th Cir., 1965; *Jones v. United States*, supra, 326 F.2d 124.]"

In the Government's Memorandum in Opposition to the Appellant's Motion for the disclosure of the identity of the informant, and on the hearing the Government *avowed* that the informant was not a participant, but merely an observer (RC, Item 5). There has been no showing to the contrary.

Appellant denied being in Nogales, Sonora, Mexico, between four and six-thirty p.m. (RT 91), as did his witness,

Robert Jackson (RT 74 to RT 75). The Government's witness placed them at the home of a known narcotics dealer, Ninni Abreu, and in the company of a man known to Washington as El Nigro (RT 96 to RT 98), and not anyone else (RT 100, L 13-16). Appellant testified he was in the company of two men (RT 83, L 7-13).

This evidence was the result of a border search. There was no necessity to demonstrate sufficient, reliable information for probable cause and therefore Appellant was not necessarily entitled to knowledge of the identity of the informer. *King v. United States*, (9th Cir., 1965), 348 F.2d 814, at page 819. Nor did he establish the materiality of the identity of the informer, that is, he denied the alleged transaction could have occurred after 4:00 p.m.; he stated he was with two men besides Jackson. None of these things concur with what Washington observed after 4:00 p.m.

It is respectfully submitted there was no necessity to disclose the identity of the informer.

VI. CONCLUSION

The chain of custody of Government's Exhibit 1-A was sufficient to admit it into evidence, and its contents were proved to be heroin, a narcotic drug, and the disclosure of the identity of the informer was not necessary to the defense.

Respectfully submitted,

RICHARD C. GORMLEY
United States Attorney
For the District of Arizona



JO ANN D. DIAMOS

Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JO ANN D. DIAMOS

Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this
.....²¹..... day of November, 1966, to:

DONALD C. CARROLL

Suite 1108-1120

995 Market Street

San Francisco, California 94103

Attorney for Appellant

21078/

~~NO. 2391~~

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY G. FONSECA,
Appellant,

v.

BERNARD W. WATSON, JR.,
Appellee.

APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF HAWAII

FILED

AUG 10 1966

WM. B. LUCK, CLERK

BRIEF OF APPELLANT

Of Counsel:

ANDERSON, WRENN & JENKS

RICHARD E. STIFEL
Bank of Hawaii Building
Honolulu, Hawaii

Attorney for Appellant

NOV 4 1966

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NO. 2391

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY G. FONSECA,)	
)	
Appellant,)	APPEAL FROM THE UNITED
v.)	STATES DISTRICT COURT FOR
)	THE DISTRICT OF HAWAII
BERNARD W. WATSON, JR.,)	
)	
Appellee.)	

JURISDICTIONAL STATEMENT

This appeal is from a final judgment in an action brought for personal injuries suffered in an automobile-pedestrian accident on June 27, 1963.

Plaintiff is a citizen of California (TR. 64-65) and defendant is a citizen of Hawaii (TR. 24).

The jurisdiction of the district court was based upon section 1332 of the Judicial Code (Title 28, U.S.C. § 1332).

The case was tried before the Honorable C. Nils Tavares without a jury from February 28, 1966 through March 2, 1966, and a judgment was entered on May 3, 1966. A motion to amend findings of fact and conclusions of law was made on May 13, 1966 and was denied by the court on May 20, 1966. Defendant's notice of appeal was filed on June 2, 1966.

This court has jurisdiction under section 1291 of the Judicial Code (Title 28, U.S.C. § 1291).

STATEMENT OF THE CASE

During the evening of June 27, 1963, defendant was driving along Kalakaua Avenue in Waikiki in a kokohead or easterly direction. He was tired and sleepy at the time (TR. 32). As he approached Lewers Street he noticed that the traffic light was green in his favor (TR. 26). He was going from 5 to 15 miles per hour (TR. 33 and 34). He then yawned, his head went down and his eyes closed (TR. 34 and 35). At or about the time he brought his head up, he saw two pedestrians in front of him, slammed on his brakes and collided with the pedestrians (TR. 37-39). Plaintiff was one of the pedestrians. The pedestrians were in the crosswalk across Kalakaua Avenue on the ewa or west side of Lewers Street when they were hit. When defendant's automobile stopped after colliding with the pedestrians the rear-end of the automobile was still in the aforementioned crosswalk. (TR. 14).

When defendant's car struck plaintiff, plaintiff's left leg was broken (TR. 67).

The district court found that defendant had been grossly negligent in driving his automobile and that plaintiff was not guilty of contributory negligence.

Plaintiff was hospitalized at Tripler Army Hospital in Hawaii until September 1963, when he was transferred to the Balboa Naval Hospital in San Diego, California (TR. 93). In October 1963, plaintiff was put on limited duty for Special Services at the Naval Station in San Diego (TR. 93). He continued on this duty until he was again hospitalized at Balboa Hospital on March 30, 1964 (EX. P-2). According to the Summary of Case History contained in the Report of Board of Medical Survey dated April 24, 1964, included in Exhibit P-2, plaintiff had no complaints when he was admitted to Balboa Hospital on March 30, 1964, and the Board found that plaintiff was "ready to resume the full and arduous duties of his rate" (EX. P-2). Plaintiff was released from active duty June 15, 1964 (TR. 101). Although plaintiff testified that he was "discharged" from the Navy (TR. 101) it was stipulated that he was actually released to inactive duty (TR. 189). It was also stipulated that this discharge from active duty was not caused by the accident of June 1963 (TR. 189).

At the time of the accident in June 1963, plaintiff's Navy base pay was \$150 a month (TR. 104). He was also receiving sea and submarine pay of \$78 a

month (TR. 104). Subsequently a military pay raise increased plaintiff's base pay from \$150 to \$190 a month (TR. 105).

After plaintiff's release from active duty he applied for various jobs, and finally in July 1964 he accepted a job in a linoleum store (TR. 105-09). Plaintiff also attended Pasadena City College during 1964 and 1965 (TR. 110).

A doctor called as a witness by the plaintiff testified that plaintiff's left leg had suffered a slight degree of medial bowing at the fracture site (TR. 124-26) and that there was some probability that this would cause difficulty in the future (TR. 133).

The district court found for plaintiff and made findings of fact and conclusions of law (R. 43-48) which included, among others, the following:

"7. Plaintiff suffered an impairment of earning capacity during the remainder of his enlistment for which he is entitled to damages as follows:

- | | | |
|--|-----------|----------|
| a. Navy base pay - six months
from June to December inclusive,
1963, at \$150.00 per month | | \$900.00 |
| b. Navy base pay - five months
from January, 1964 to June 6,
1964, at \$190.00 per month | | 950.00 |

- c. Eleven months for sea and sub pay, or hazardous duty and sea pay at \$78.00 per month \$858.00

8. Plaintiff suffered and continues to suffer a loss of civilian wages after his release from active duty for which he is entitled to damages as follows:

- a. Loss of civilian wages after release from active duty -- from June, 1964, to February 1966, inclusive -- or one year and 9 months, less 9 months of school attendance, 40 hours per week times 50 weeks (the Court finding that plaintiff during that period suffered a loss of \$1.00 per hour in earning power due to the accident and the reluctance of employers to employ a person with an injury of that late vintage; this finding, however, not being based upon the hearsay testimony as to what the doctor for Pacific Telephone Co. told plaintiff as to the reason for his not being hired.) . . \$2,000.00
- b. Future loss of civilian pay, for an estimated additional 3 years, less 9 months each year of college work, or 9 months, at \$1.00 per hour, for 36 weeks, or \$40.00 times 36 weeks . . . \$1,440.00

9. Plaintiff was furnished medical and hospital expenses by the United States, the reasonable value of which was \$3,500.

10. Defendant had been and was at the time of collision driving his car in a grossly negligent manner, and heedless of the safety of others, for which exemplary damages of \$1,750 are assessed against defendant.

11. By reason of the collision and plaintiff's injuries, plaintiff is entitled to general damages as follows:

- a. Initial injury, June 27, 1963,
violation of person, striking,
thrown into air, with both bones
of left leg broken and dangling,
shock, fright, pain and suffer-
ing \$5,000.00
- b. 8-2/3 months, approximately, in
cast from June 28, 1963, to ap-
proximately 18 March, 1964, pain,
suffering, embarrassment, dis-
comfort and inconvenience . . . \$4,500.00
- c. After removal of cast on
March 18, 1964, to time assign-
ed back to duty, including
painful and discomfoting
physiotherapy and painful
and discomfoting efforts to
regain normal use of leg,
from 18 March, 1964 to 6 May,
1964 (approximately 1-2/3 months),
not including any damages for
deformity . . . \$1,000.00
- d. From 6 May, 1964 to March 2, 1965,
occasional pain, inconvenience
and suffering, approximately
10 months, excluding deformity
. . . \$ 500.00
- e. Future pain and suffering,
with reasonable medical certainty
of arthritic conditions which
will be caused by bowing of
leg bones and tilting of ankle
bones . . . \$2,000.00
- f. Deformity from scarring,
bowing and lumping of leg . . . \$2,500.00"

Thereafter, judgment was entered for plaintiff
for \$26,898 (R. 49).

Defendant moved to amend the findings of fact and conclusions of law in respect to the exemplary damages and to reopen the trial so as to permit defendant to introduce evidence as to his financial standing (R. 53). These motions were denied in an order filed May 23, 1966 (R. 62).

SPECIFICATIONS OF ERRORS

The district court erred:

1. In finding that plaintiff was entitled to damages in the amount of his Navy base pay from June 1963 to June 1964, in the total amount of \$1,850 (Finding of Fact No. 7, R. 45).

2. In finding that the plaintiff suffered a loss of civilian wages after release from active duty from June 1964 to February 1966, amounting to \$2,000 (Finding of Fact No. 8a, R. 46).

3. In finding that the plaintiff will suffer a future loss of civilian pay for an estimated additional three years at the rate of \$1.00 per hour amounting to \$1,440 (Finding of Fact No. 8b, R. 46).

4. In finding that plaintiff was entitled to damages for future pain and suffering, with a reasonable medical certainty of arthritic conditions which will be caused by the bowing of leg bones and the tilting of ankle bones, in the amount of \$2,000 (Finding of Fact No. 11, R. 47).

5. In finding that defendant was grossly negligent in the manner in which he drove his automobile and in assessing exemplary damages against defendant in

the sum of \$1,750 (Finding of Fact No. 10, R. 46).

6. In denying defendant's motion to reopen the evidence to permit defendant to introduce evidence as to his financial standing (R. 62).

SUMMARY OF ARGUMENT

The court erred in allowing as damages the amount of plaintiff's base pay from the Navy from June 1963 through June 1964 in the total amount of \$1,850 because plaintiff received his full Navy base pay during this period and therefore suffered no loss and because the so-called collateral source doctrine does not apply where, as here, the injured person performs services while he continues to receive his regular pay, and therefore the amount of the judgment should be reduced by \$1,850.

The court erred in allowing plaintiff \$2,000 as loss of civilian wages from June 1964 to February 1966 computed at the rate of \$1.00 per hour, forty hours per week because there is no evidence in the record supporting any such loss, and therefore the amount of the judgment should be further reduced by \$2,000.

The court erred in allowing plaintiff as loss of future civilian pay for three years the sum of \$1,440 computed at the rate of \$1.00 per hour, for forty hours per week for a total of 36 weeks because there is no evidence in the record supporting any such loss,

and therefore the amount of the judgment should be further reduced by \$1,440.

The court erred in allowing plaintiff \$2,000 for future pain and suffering and arthritis because there is no substantial evidence in the record that plaintiff would with reasonable medical certainty suffer any future pain or arthritis, and therefore the amount of the judgment should be further reduced by \$2,000.

The court erred in awarding plaintiff \$1,750 in exemplary damages because there was no evidence that defendant was guilty of such negligence as to warrant the imposition of exemplary damages, and therefore the amount of the judgment should be further reduced by \$1,750. Even if there were a basis for such damages the amount allowed was grossly excessive.

The court erred in refusing to reopen the trial to permit defendant to introduce evidence as to his financial standing because such evidence should be considered in connection with the allowance of exemplary damages.

ARGUMENT

I. INTRODUCTION

This appeal is governed by Rule 52(a) of the Federal Rules of Civil Procedure, as amended. The rule provides, in part:

"(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . ."

The Supreme Court in the case of United States v. United States Gypsum Co., 333 U.S. 364, 68 Sup. Ct. 525, 92 L. Ed. 46 (1948), defined the scope of appellate review by stating that, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. at 395. This court has been faced with the application of Rule 52(a) in many cases, e.g., Joseph v. Donover Co., 261 F.2d 812 (9th Cir. 1958); Smallfield v. Home Ins. Co., 244 F.2d 337 (9th Cir. 1957), and has reversed the findings of the trial court where there was no evidence to support its findings.

E.g., Los Angeles Trust Deed & Mortgage Exch. v. Securities & Exch. Comm'n, 264 F.2d 199 (9th Cir. 1959); United States Nat'l Bank v. Fabri-Valve Co., 235 F.2d 565 (9th Cir. 1956). In the Fabri-Valve case, this court said:

"While every intendment must be given the district court's findings, and especially so with respect to damages, yet this court believes the damages awarded classify as clearly erroneous. . . ."
Id. at 570.

In the case of Stacher v. United States, 258 F.2d 112 (9th Cir. 1958), this court made the statement that:

"Appellee is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of residence. If, when so viewed, there was substantial evidence to sustain the findings, then the judgment may not be reversed by this Court unless against the clear weight of the evidence or unless influenced by an erroneous view of the law." (Emphasis added.)

From this court's own precedent it is thus well established that there must be substantial evidence in the record to support a district court's findings of fact or such findings will be deemed "clearly erroneous" and set aside. Furthermore, the statements just quoted from Stacher v. United States, id., show that a finding will be set aside if it was "influenced by an erroneous view of the law."

II. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF WAS ENTITLED TO DAMAGES IN THE AMOUNT OF HIS NAVY BASE PAY FROM JUNE 1963 TO JUNE 1964, IN THE TOTAL AMOUNT OF \$1,850.

Finding of Fact No. 7 reads in part as follows:

"7. Plaintiff suffered an impairment of earning capacity during the remainder of his enlistment for which he is entitled to damages as follows:

- a. Navy base pay - six months
from June to December inclusive, 1963, at \$150.00
per month \$900.00
- b. Navy base pay - five months
from January, 1964 to June
6, 1964, at \$190.00 per
month \$950.00"

Plaintiff gave the only testimony upon which the above finding could possibly be based. It was established by his testimony that at the time of the accident he was on active duty in the United States Navy and continued on active duty until he was released to inactive duty June 15, 1964 (TR. 101 and 189). There was no evidence that plaintiff lost any part of his Navy pay as a result of the accident and although it might be inferred that he lost his hazardous duty pay and sea pay, there was absolutely no testimony that the plaintiff lost any part of his Navy base pay from the time of the accident until his release from active duty. Since

plaintiff lost no part of his base pay he was not entitled to any damages measured by his base pay.

Evidently the court was relying upon the so-called "collateral source" doctrine in awarding damages for lost income although there was no actual loss of income. This doctrine provides that compensation or indemnity received by an injured plaintiff from a collateral source wholly independent of the defendant, as from insurance, workmen's compensation, social security and the like, cannot be set up by defendant as mitigation or reduction of plaintiff's damages. Where the claim is for lost wages and the wages continue to be paid after the accident, however, the doctrine does not apply during any period in which the plaintiff performs services for those wages even though as a result of the injuries the extent or quality of the services is less than before.

In Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 Atl. 958 (1904), the court held that where the injured plaintiff, after the injury, performed services for his employer, similar to, but less efficient than, those performed before the injury, the payment of his salary by his employer was not a gratuity, and he could not recover from the defendant for loss of earning power during the time he performed services. The court said:

"It is clear . . . that during all the time he was receiving payment, except for a few weeks when consulting surgeons, he was performing services for his company. . . . The company continued to pay his regular salary after his injury, and, so far as his own testimony and that of the treasurer shows, the payment was for services, inefficient, perhaps, compared to those before his injury, but still for services rendered by him to the company. . . ." Id. at 961.

In the case of Moon v. St. Louis Transit Co., 247 Mo. 227, 152 S.W. 303 (1912), the plaintiff, the president of a corporation, after sustaining an injury, was unable to attend to business duties daily, but he did go to the office once or twice a week and attended certain meetings. His salary was paid to him regularly, without any deduction. The court held that, in the absence of evidence showing that the plaintiff did not perform the services incumbent on him as president, the salary payments were not gratuities, and that the plaintiff could not recover for loss of time from the defendant. The court, in distinguishing cases where the plaintiff's salary is paid as a gratuity, stated:

"It may . . . be conceded that in case one is employed for wages or in a subordinate capacity on a salary, and his right to the agreed compensation depends

upon his rendition of specific services, and his failure to render such services ends his right to compensation, then, in case of his injury and consequent inability and failure to work, he has no legal claim to compensation, and, if money is paid him, it is on its face a mere gratuity, and falls within the rule. Before the rule as to gratuities can apply in a particular case, however, the evidence must show the payment was a gratuity. The burden is on respondent to show loss of time and its value. If the . . . Company was not entitled to his whole time the value, if any, of the excess might be recovered, but there is no evidence in this record justifying a recovery on such theory. The only evidence in connection with loss of time relates to time lost from respondent's duties as president of the . . . Company, and there having been no evidence he owed any duty he did not perform, and the respondent's own testimony showing he received during the whole time the amount agreed to be paid him as salary and that he drew it and the company paid it and charged it to him as salary, the rule as to gratuities on the record before us has nothing to do with the case. There was no evidence justifying the instruction authorizing recovery for loss of time. . . ." Id. at 305.

In the present case plaintiff received his full base pay from the date of the accident in June 1963 until his release from active duty in June 1964. During most of this time he was actually on duty, albeit limited

duty, performing services. The Report of Board of Medical Survey dated September 30, 1963, included as part of Exhibit P-2, stated that plaintiff was at that time "fit for duty" and recommended that he be assigned to limited duty. Plaintiff testified that in October 1963 he went to work for "Special Services" at the Naval Station at San Diego (TR. 93). Plaintiff continued on limited duty until he was readmitted to the hospital on March 30, 1964 (TR. 96 and EX. P-2). According to the Report of Board of Medical Survey dated April 29, 1964, included in Exhibit P-2, plaintiff was then ready "to resume the full and arduous duties of his rate" and it was recommended that he be returned to full duty. The report also states that plaintiff was informed of the Board's findings and did not wish to make a rebuttal. (EX. P-2). Plaintiff was then returned to the Naval Station at San Diego where he remained on duty until his release to inactive duty June 15, 1964 (TR. 101).

Thus the uncontradicted evidence is that during most of the period from the date of the accident in June 1963 until plaintiff's release to inactive duty in June 1964 he was on duty or limited duty and performing services. Thus the collateral source doctrine is in-

applicable and since there was no actual loss of Navy base pay, there was no basis for the district court's awarding \$1,850 in damages measured by plaintiff's base pay. Therefore, the amount of the judgment should be reduced by \$1,850.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFF SUFFERED A LOSS OF CIVILIAN WAGES AFTER HE WAS RELEASED FROM ACTIVE DUTY FROM JUNE, 1964 TO FEBRUARY, 1966 IN THE AMOUNT OF \$2,000.

Finding of Fact No. 8a is as follows:

"8. Plaintiff suffered and continues to suffer a loss of civilian wages after his release from active duty for which he is entitled to damages as follows:

"a. Loss of civilian wages after release from active duty -- from June, 1964, to February, 1966, inclusive -- or one year and 9 months, less 9 months of school attendance, 40 hours per week times 50 weeks (the Court finding that plaintiff during that period suffered a loss of \$1.00 per hour in earning power due to the accident and the reluctance of employers to employ a person with an injury of that late vintage; this find, however, not being based upon the hearsay testimony as to what the doctor for Pacific Telephone Co. told plaintiff as to the reason for his not being hired.) \$2,000.00"

All of the evidence as to plaintiff's civilian employment and attempts to obtain civilian employment and plaintiff's civilian wages appears on pages 105 through 113 of the transcript of plaintiff's testimony. This evidence may be summarized as follows. A week after his release from the Navy plaintiff applied for a job at Pacific Telephone Company in California (TR. 105). He took some tests and had a physical by a private doctor (TR. 105) and another physical by a doctor at the com-

pany's Olive Street office (TR. 106). Plaintiff was turned down for the job (TR. 106) and over defendant's objection, was allowed to testify, "they [the company] said they wouldn't hire me because of my leg" (TR. 107). Early in July 1964 plaintiff worked for Counselor Book Corporation for two days and stopped because his leg would swell up from standing (TR. 108). Plaintiff then went to work in a linoleum store in Alhambra, California where he was still working at the time of trial (TR. 108). His starting pay was \$1.50 per hour which was increased to \$1.75 per hour in July 1965 (TR. 109). Plaintiff testified he had sought a job with the telephone company "working on the frame" and when asked what his starting pay would have been with the telephone company was allowed, over defendant's objection, to answer:

"I am not sure of the exact amount
It was around two and a half an hour."
(TR. 109).

Plaintiff attended Pasedena City College for the fall semester in 1964 and the spring semester in 1965, at the same time working part time for the linoleum company (TR. 110). Plaintiff also had been offered a job with a company called "Square Deal" early in July 1964, but turned it down because it involved standing on an assembly

line 8 hours a day (TR. 110-11). In November 1964 plaintiff "inquired" about a job at Southern California Edison Company. He testified that he was turned down but gave no reason for this (TR. 112). Plaintiff also inquired about a job at Sperry Rand Corporation, but he did not testify as to when this was or as to the results of the inquiry. Plaintiff was asked if it had been his intention after getting out of the Navy "to go back to school anyway?" and he answered:

"I was trying to work days and go to school nights. As it is, I worked, I went to school day and night and worked in the linoleum store for one semester. And I had enough money so I could go through the next semester just going to school." (TR. 112-13).

Other than the testimony just summarized there is nothing in the record relating to plaintiff's employment, and it is submitted that this testimony does not

support a finding that the plaintiff suffered a loss of civilian wages in the amount of \$1.00 per hour:

In order to be entitled to damages for loss of earnings, plaintiff had to prove the amount of his loss with reasonable certainty:

"But although specific items of evidence will vary from case to case, the value of the lost time must be proved with reasonable certainty, so that the jury will not have to base an award on mere speculation. If the reviewing court, after considering the evidence, believes that the jury's verdict covering the loss of plaintiff's time prior to the trial was based upon speculation, the court will not sustain the verdict." 22 Am. Jur. 2d Damages § 91, at 133.

"A claim of damages for lost or diminished earning capacity must be supported by satisfactory proof of the fact of such impairment, the extent thereof, and, in the case of a claim for permanent impairment of earning power, by satisfactory evidence of the permanency of the injury; and the proof should be made by the best evidence available. Proof with

certainty or mathematical exactness is not required, nor need the proof be clear and indubitable; but such damages cannot be left to mere conjecture. Proof of the age, health, and habits of the party injured does not, standing alone, ordinarily afford a sufficient basis on which to rest a verdict for loss of earning power; nor can pecuniary loss from a claimed diminution in earning capacity or in ability to perform services be determined solely on proof of a diminution in capacity to labor." 25 C.J.S. Damages § 162, pp. 826-27.

The requirement of "reasonable certainty" has not been met in respect to the claim for loss of earnings.

Plaintiff was offered jobs by the linoleum company, by Counselor Book Corporation and by the Square Deal Company. He gave no reason for his rejection by Southern California Edison Company nor did he state the outcome of his inquiry to Sperry Rand Corporation. Therefore, the only possible basis in the record for Finding of Fact No. 8a that plaintiff lost a dollar per hour in earning capacity was plaintiff's testimony (a) that he was not hired by Pacific Telephone Company because of his leg (b) that the telephone company job paid "around two-and-a-half an hour" and (c) that when he started with the linoleum company he was paid \$1.50 per hour.

Plaintiff's testimony as to why he was not hired was objected to as hearsay. Plaintiff might

have been told that he was not hired on account of his leg while the rejection might actually have been for some other reason. For example, plaintiff testified that he had to take some tests in connection with his application, but he offered no proof that he had passed those tests. Possibly the telephone company had a unique policy of never hiring an applicant who had had a broken bone. However, there are certainly other employers who do not have such a policy.

In other words, the mere fact that one prospective employer may have rejected plaintiff on account of his leg does not mean that all others would have done likewise (in fact, Counselor Book Corporation, the linoleum company and the Square Deal Company did not reject him) and certainly does not establish any general loss of earning capacity.

The district judge realized that plaintiff's statement as to why he was rejected was objectionable, for in Finding of Fact No. 8a he expressly stated that the finding was not based upon plaintiff's hearsay testimony as to what the telephone company's doctor told him. However, instead of saving or preserving



the finding this is fatal to it because it creates a fatal gap in the evidence required to support the finding since it means that the finding is not supported by even a single instance of the plaintiff's having been rejected for employment because of his injuries. Thus the finding that employers were reluctant "to employ a person with an injury of that late vintage" is not based upon evidence but is sheer speculation.

The inadequacy of the evidence relative to the Pacific Telephone Company rejection is also indicated by the unsatisfactory evidence as to what the starting pay would have been. Plaintiff said only that it was "around" \$2.50 per hour. This was, of course, susceptible of exact proof and there was no reason for the court to accept plaintiff's guess. Furthermore, even if plaintiff had been given a job by the telephone company, there was no evidence to indicate whether or not he would have been able to hold it. This is a very real question in view of plaintiff's attending college, for it seems highly unlikely that the telephone company would pay \$2.50 per hour for part time work during summer vacations.

Since there is no evidence to support the award for loss of civilian wages in the amount of \$2,000, the judgment should be reduced further by this amount.

IV. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF WILL SUFFER A FUTURE LOSS OF CIVILIAN PAY FOR AN ADDITIONAL THREE YEARS IN THE AMOUNT OF \$1,440.

Finding of Fact 8b is as follows:

"8. Plaintiff suffered and continues to suffer a loss of civilian wages after his release from active duty for which he is entitled to damages as follows:

* * *

"b. Future loss of civilian pay, for an estimated additional 3 years, less 9 months each year of college work, or 9 months, at \$1.00 per hour, for 36 weeks, or \$40.00 times 36 weeks - - \$1,440.00"

As in the case of the award of \$2,000 for loss of past civilian wages the award for loss of future wages could only have been based upon the rejection of plaintiff's application for a job with the Pacific Telephone Company and for the same reasons set forth in the preceding section of this brief this award is entirely without support in the record.

In finding a loss of wages of \$1.00 per hour -- apparently a loss from \$2.50 per hour to \$1.50 per hour -- from June 1964 through February 1969, the district court has in effect found that plaintiff suffered a 40% loss of earning capacity for a period of four years and nine months after June 1964. That the court made this projection on

the basis of hearsay testimony as to a single rejection of an application of employment makes it clear that the court was speculating rather than drawing a reasonable inference from the evidence.

The allowance of damages for loss of civilian wages is also completely at variance with all of the medical evidence. It will be recalled that according to the Report of Board of Medical Survey dated April 29, 1964 (EX. P-2) the Board found that plaintiff was ready to resume the full and arduous duties of his rate and recommended that he be returned to full duty.

Dr. Nadamoto, who testified for the plaintiff, said that his examination revealed that plaintiff walked well, on tip toes and on the heels (TR. 127), that the muscle power of the left leg was good (TR. 127), that the range of motion of the left knee and ankle were within normal limits without associated pain (TR. 128) and that while the tilting of the ankle joint might cause trouble in the future it was impossible to say when this might be (TR. 133). There was nothing in Dr. Nadamoto's testimony to indicate any existing disability.

Dr. Gullledge, who testified for defendant, said that his examination revealed that plaintiff walked without

a limp (TR. 155) and that there was a full range of motion of the left hip, ankle and knee (TR. 156). Dr. Gullledge also testified that the condition of plaintiff's left leg should not interfere with his ability to carry on employment and that so far as his left leg was concerned he was qualified for a job requiring physical activity (TR. 158).

The allowance of \$1,440.00 being nothing more than speculation based upon testimony that the district judge acknowledged was objectionable should not be allowed to stand and, therefore, the judgment should be further reduced by this amount.

V. THE DISTRICT COURT ERRED IN ALLOWING PLAINTIFF \$2,000 FOR FUTURE PAIN AND SUFFERING BECAUSE OF AN ARTHRITIC CONDITION WHICH THE COURT FOUND WOULD BE CAUSED BY THE BOWING OF THE LEG BONES AND THE TILTING OF THE ANKLE BONES OF HIS LEFT LEG.

Finding of Fact number 11e is as follows:

"11. By reason of the collision and plaintiff's injuries, plaintiff is entitled to general damages as follows:

* * *

"e. Future pain and suffering, with reasonable medical certainty of arthritic conditions which will be caused by bowing of leg bones and tilting of ankle bones - - \$2,000.00"

The medical testimony produced at the trial with respect to the plaintiff's injuries was given by Dr. Ichiro Nadamoto (TR. 121-37), called by the plaintiff, and Dr. William H. Gullledge, called by the defendant (TR. 152-88).

With respect to the likelihood that the plaintiff would suffer an arthritic condition in the future, Dr. Nadamoto testified on direct examination as follows:

"Q. Doctor, with reasonable medical certainty, could you say, would the bowing in Mr. Watson's left leg increase with the passage of time?

A. With reasonable medical certainty, I can say that the bowing will not increase, since the growth has



been attained.

MR. STIFEL: Since what?

THE WITNESS: Since the extent of the growth has been attained already and the fracture has healed well.

Q. (By Mr. Conklin) With reasonable medical certainty, will the tilting of the ankle mortise increase with the passage of time?

A. Likewise, I do not think it will increase with the passage of time.

Q. Will either of these two conditions you have described, Doctor, meaning thereby the leg bowing or the tilting of the ankle mortise, will either of these conditions with reasonable medical certainty cause Mr. Watson any difficulty in the future?

A. With reasonable medical certainty, I would be of the opinion that the ankle mortise tilting would be the one that may, in the future, give difficulty, give rise to difficulty at the ankle joint.

Q. Why?

A. Because of the major fact that the ankle is a weight-bearing joint and the stress and strain of the ankle joint has been altered in the left as compared to the right.

Q. Will it grind down the ankle bone?

A. I think the probability, with reasonable medical certainty, is that of a future arthritic condition of the ankle joint.

Q. Is there any way for you to tell with reasonable medical certainty when that might take place?

A. No, sir.

Q. Is there any reasonable medical certainty as to when that might start to take place?

A. No, sir.

Q. Will either the bowing of the leg or the tilting of the ankle joint, with reasonable medical certainty, cause any difficulty with the knee in the future?

A. Well, in medical knowledge, it is such that we know that with reasonable medical certainty if the foot is in difficulty, it may give rise to difficulty with the ankle, to the knee, and subsequently to the back. And knowing this to be true in different cases, of different conditions, I would say that with reasonable medical certainty it is my opinion that it may give rise to future knee difficulties.

Q. Can you tell when this might take place?

A. No, sir.

Q. With reasonable medical certainty, can you say

whether this tilting of the ankle mortise may cause pain in the future, or will cause pain in the future? In other words, we have established that the condition of arthritis is such that people sometimes have arthritis without pain.

A. Yes, sir.

Q. Well, what is the situation here, or can you tell?

A. Well, on the premise, on the statement that I made, traumatic arthritis in this ankle joint in all probability will give rise to pain.

Q. Would the same hold with regard to any joint?

A. Yes, sir. " (TR. 132-34)

On cross-examination, the following exchange took place:

"Q. Doctor, each time the term "reasonable medical certainty" is used, it is followed by the word "may," isn't it?

A. Yes, sir.

Q. So you don't mean to suggest to the Court that if these things may arise that they will with certainty arise?

A. There is nothing definite, but the probability is there.

Q. And it is also possible that these possibilities will not arise?

MR. CONKLIN: He used the term "probability," Counsel.

A. It is more probability than a possibility.

Q. (By Mr. Stifel) Now, the X-rays that you took showed that the bones are lined up well, do they not? The broken bones?

A. Yes, the X-rays showed the healing to be good with the results mentioned previously; that is, the slight medial bowing at the fracture site.

Q. And I think that you performed tests to determine the strength of the left leg?

A. Yes, sir.

Q. And did you compare the strength of the left leg with the right?

A. Yes, sir.

Q. And how did you do that?

A. The X-rays revealed that the musculature was good on the left leg.

Q. Did you determine the range of motion of the hip joint?

A. No, sir.

Q. Did you determine the range of motion of the knee joint?

A. Yes, sir.

Q. And what did you find there?

A. The measurement was not -- I mean, it was not clinically made except for gross clinical measurement, which was within normal limits.

Q. Did you determine the range of motion of the ankle bone?

A. Yes, I did.

Q. And would that be within the normal range?

A. I so stated previously. " (TR. 134-36)

Dr. Gulledge, called by the defendant, testified on direct examination as follows:

"Q. Now, Doctor, I call your attention to Exhibit D-2, and in particular to the point where the tibia approaches the uppermost bone in the ankle. Do you see which point I am trying to describe? I may not have described it medically accurately. But what is that joint called, if there is a name?

A. This joint? (Indicating)

Q. The joint between the tibia and the ankle bone.

A. That is called the ankle joint.

Q. The ankle joint?

A. Yes.

Q. Now, did you notice any tilt in that ankle joint?

A. Yes, there is a slight tilt as the result of the slight bowing, as the result of the fracture.

Q. A leg that has not been injured, let's say a normal leg, does that have any sort of a tilt whatsoever?

A. Yes, it does.

Q. In other words, the lower surface of the tibia is not horizontal, exactly horizontal?

A. No.

MR. CONKLIN: Excuse me, Counsel. Are you speaking in general?

MR. STIFEL: I am speaking in general.

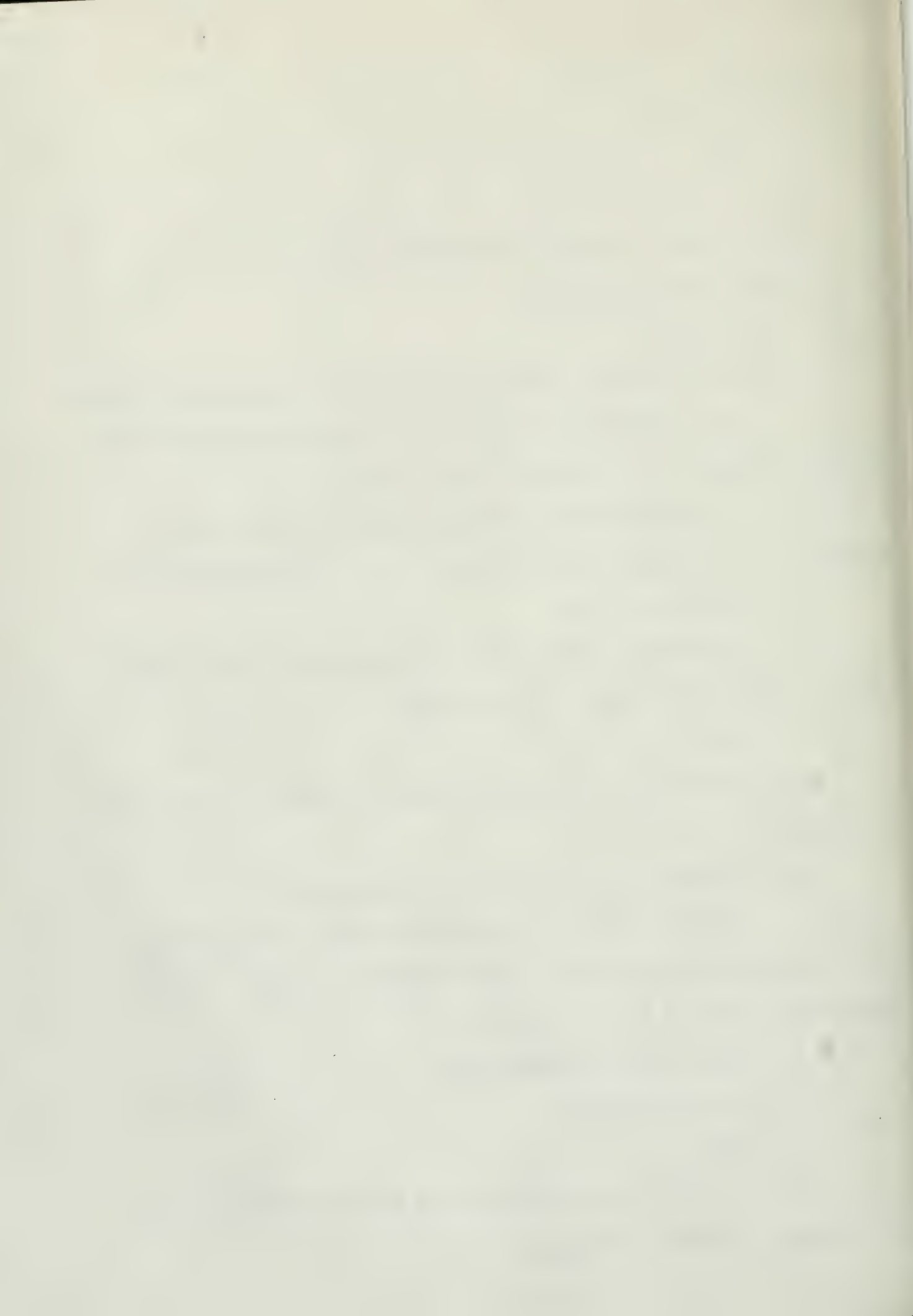
Q. (By Mr. Stifel) In other words, in a normal and average individual, you would expect to find a slight degree of tilt, is that correct?

A. Tilt to the inside, yes.

Q. To the inside?

A. Yes.

Q. In which direction is the tilt of Mr. Watson's left leg? Is that also to the inside?



A. To the inside, yes.

Q. Now, how much difference did you note between the tilt in Mr. Watson's left leg and what you would consider to be normal? Is there any significant difference?

A. Well, there is a slight variation here. Some people have more tilt than others. I did not take X-rays of the other leg." (TR. 158-60)

* * *

"Q. Now, you have testified to a certain tilt in the ankle joint. Would you point out on the two exhibits what you were referring to?

A. Yes, this ankle joint here. (Indicating on X-ray film)

Q. You are now pointing to the right leg?

A. This is the right leg, yes. It is tilted a little bit in.

Q. How about the left?

A. And the same, perhaps a few degrees more on the left side.

THE COURT: When you say it is tilted towards the inside, -- I see what you mean -- the man is facing us?

THE WITNESS: Yes.

THE COURT: Is there a little bit more of a tilt on the left?

THE WITNESS: A few degrees. I didn't measure it out. I don't know that I could measure it accurately within the language --

Q. (By Mr. Stifel) Doctor, do you have an opinion based upon reasonable medical certainty as to whether the few degrees of additional tilt of the left leg would cause any problems to Mr. Watson in the future?

A. I don't think so; I don't think it will.

Q. Do you have an opinion as to whether a few additional degrees of tilt will cause arthritis in Mr. Watson's left leg in the future?

A. It is possible but I don't think that it will.

Q. Now, by use of the word "possible," could you be a little bit more specific? Do you mean a substantial possibility or a bare possibility? How would you characterize it?

A. Well, I would say a bare possibility. We are taught when we are learning about this business that an abnormal weight-bearing ankle to a joint can result in increased strain on that joint, with resultant arthritic changes taking place slowly over a period of years." (TR. 162-63)

* * *

"Q. Now, you have seen, I assume, in your 25 years of practice here many patients who have had broken tibias and fibulas, have you not?

A. Yes, sir.

Q. And I take it you have seen so many patients over a period of years who have arthritis of the ankle joint?

A. Yes, sir.

Q. Have you ever seen a patient with arthritis of the joint whom you believe had his arthritis result from a malalignment of a broken tibia and fibula?

A. No, I haven't.

Q. Doctor, I asked you whether or not you had an opinion as to whether the condition of the leg would affect Mr. Watson's employment, and I believe you said no. Were you referring just to the present or for the future as well?

A. Present and the future.

Q. You don't feel that there will be an impairment of his ability to engage in employment in the future?

A. No." (TR. 164-65)

Other than the above testimony, there is nothing in the record which relates to the matter of the plaintiff suffering an arthritic condition in the future due to his injury. The district court found that the plaintiff will



suffer an arthritic condition in the future "with reasonable medical certainty." The question this court must answer is: Is there substantial evidence in the above contradictory testimony which can support the district court's finding to a "reasonable medical certainty"?

It is interesting to note that when Dr. Nadamoto was asked whether the bowing in plaintiff's leg would increase, he answered categorically:

"With reasonable medical certainty,
I can say that the bowing will not in-
crease, since the growth has been attained."
(TR. 132)

However, when asked whether the conditions of plaintiff's leg would give plaintiff difficulty in the future he answered:

"With reasonable medical certainty,
I would be of the opinion that the ankle
mortise tilting would be the one that may,
in the future, give difficulty, give rise
to difficulty at the ankle joint."
(TR. 133) (Emphasis added).

The doctor's use of the word "may" deprives his answer of any degree of real certainty whatsoever. Dr. Nadamoto did not say that he had ever seen a person with arthritis of the ankle joint caused by a broken leg. Furthermore, he did not state that the tilting that he found in the ankle joint was

a result of the broken leg or of the accident of June 1963.

Dr. Gullledge, on the other hand, testified that the average individual who has not had a broken leg has some degree of tilt at the ankle joint (TR. 159). While Dr. Gullledge found a slight variation in the tilt in plaintiff's left ankle (TR. 159 and 162) he stated that he did not think that this would cause plaintiff any trouble:

"Q. (By Mr. Stifel) Doctor, do you have an opinion based upon reasonable medical certainty as to whether the few degrees of additional tilt of the left leg would cause any problems to Mr. Watson in the future?

A. I don't think so; I don't think it will.

Q. Do you have an opinion as to whether a few additional degrees of tilt will cause arthritis in Mr. Watson's left leg in the future?

A. It is possible but I don't think that it will.

Q. Now, by use of the word "possible," could you be a little bit more specific? Do you mean a substantial possibility or a bare possibility? How would you characterize it?

A. Well, I would say a bare possibility. We are taught when we are learning about this business that an

abnormal weight-bearing ankle to a joint can result in increased strain on that joint, with resultant arthritic changes taking place slowly over a period of years." (TR. 163)

Furthermore, Dr. Gullledge testified that in his 25 years of practice he had seen many patients with broken legs and many patients with arthritis of the ankle joint but that he had never seen a patient with arthritis of the ankle joint whose arthritis he believed was due to a malalignment of a broken leg (TR. 164).

To be entitled to damages for future arthritis plaintiff was required to show that the arthritis would occur with reasonable medical certainty. In Condron v. Harl, 46 Haw. 66, the evidence showed that plaintiff had a ruptured intervertebral disc and that surgery was to be considered when plaintiff felt that living with the condition was too burdensome. The trial court permitted the jury to consider the expense of such surgery as an element of damages and upon appeal this was held to have been error:

"The testimony was to the effect that plaintiff, on medical advice, was seeking to live with his disability, rather than to be operated upon. Surgery, it was testified, was an alternative to be considered "at such time as he felt that living with it was too burdensome." There was insufficient evidence to show with reasonable certainty that plaintiff's condition would, in future, call for an operation. Accordingly, it was error to

submit to the jury the matter of an award for the expenses incident thereto." (p. 76)

In the present case the evidence does not support the court's finding that plaintiff will with reasonable medical certainty suffer from arthritis as a result of the accident and, therefore, the allowance of \$2,000 for this item should be disallowed and the amount of the judgment reduced accordingly.

VI. THE DISTRICT COURT ERRED IN AWARDING PLAINTIFF \$1,750 IN EXEMPLARY DAMAGES BECAUSE THERE WAS NO EVIDENCE THAT DEFENDANT WAS GUILTY OF SUCH NEGLIGENCE AS TO WARRANT SUCH DAMAGES AND BECAUSE THE AMOUNT ALLOWED WAS GROSSLY EXCESSIVE. THE COURT ALSO ERRED IN DENYING DEFENDANT'S MOTION TO AMEND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE AWARD OF PUNITIVE DAMAGES.

Finding of fact number 10 is as follows:

"10. Defendant had been and was at the time of collision driving his car in a grossly negligent manner, and heedless of the safety of others, for which exemplary damages of \$1,750 are assessed against defendant."

The findings of fact and conclusions of law were filed May 3, 1966, and on May 13, 1966, defendant filed a motion to amend the findings and conclusions in respect to the award of exemplary damages (R. 53). At the hearing on said motion defendant moved that he be permitted to offer evidence as to defendant's financial standing. On May 23, 1966, the court filed an order denying the motion to amend the findings and conclusions and denying the motion to reopen the trial (R. 62).

a. Defendant's conduct did not warrant an
award of punitive damages.

In some cases punitive damages have been allowed because the rules pertaining to damages did not permit the plaintiff to be adequately compensated by

compensatory damages (Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351, 353-54 (1885)).

However, in the instant case substantial compensatory damages were awarded for pain, suffering, loss of wages, medical expense, disability, shock, fright, embarrassment, discomfort, and inconvenience. In fact, there were twelve separate items of compensatory damages set forth in the district court's findings of fact. Therefore, it is clear that the \$1,750 punitive damages were awarded solely for the purpose of punishing the defendant and were not intended in any way to include elements of compensation.

Exemplary damages are not recoverable for mere negligence (22 Am.Jur.2d, Damages, § 251). Furthermore, to warrant exemplary damages the negligence must have been so great as to show an entire want of care:

"Not every case of gross negligence will authorize the allowance of punitive damages. It has been held that to warrant the allowance of exemplary damages, the negligence must be so gross as to evince an entire want of care and that it must have something of a criminal character. According to some of the cases, exemplary damages may not be allowed unless the negligence is so gross as to amount to positive bad faith, to be deemed equivalent to an evil intent, wantonness, recklessness, or to indicate malice." 22 Am. Jur. 2d Damages § 252.

In Hawaii the basis for allowing punitive damages was discussed in Bright v. Quinn, 20 Haw. 504 (1911), where the court laid down the following rules:

"it is now too well established to admit of argument that in actions of tort punitive damages may, under certain circumstances, be awarded in addition to such sum as the plaintiff may be found entitled to purely by way of compensation for his injuries and suffering. . . . Such damages may be awarded in cases where the defendant 'has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations'; or where there has been 'some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences'. In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them. . . ."

See also Glover v. L. K. Fong, 40 Haw. 503 (1954); Howell v. Asso. Hotels, etc. et al., 40 Haw. 492 (1954); Jendrusch v. Abbott, 39 Haw. 506 (1952).

The record in the instant case concededly shows that the defendant was not acting with utmost caution and care at the time of the accident. But his conduct was not reprehensible or reckless, and the drunken driver or the speeding driver is certainly much more

deserving of serious punishment than the exhausted driver who, while proceeding slowly along the street, strikes a pedestrian because he is momentarily overcome by sleepiness.

In the present case defendant admittedly was sleepy (TR. 30-32) and this sleepiness caused the accident. However, the sleepiness was due to hard work (TR. 31-32) and there was no evidence that defendant was intoxicated. Indeed police officer Peiper testified that defendant did not appear to be under the influence of alcohol (TR. 23). Plaintiff's witness Moore testified that defendant "was not speeding at any time" (TR. 58). Furthermore, it is obvious that far from being indifferent to the public, defendant had reduced his speed to the point where he was travelling only ten or fifteen miles per hour as he drove along Kalakaua Avenue towards the scene of the accident (TR. 34). He had slowed down even further before the impact, for although defendant did not see plaintiff until about the time of the impact, he was able to bring his car to a complete stop without skidding and so that the rear wheels were still in the crosswalk in which the accident occurred (TR. 13, 14 and 23).

This is not a picture of a malicious, wanton, malefactor whose conduct is so reckless as to require imposition of a large fine. Instead it is a picture of a tired workingman who, in spite of slowing his automobile to a crawl, had the misfortune of having his eyes closed by sleepiness for just an instant too long so that he was unable to avoid striking the plaintiff. These facts do not warrant the imposition of punitive damages.

Punitive damages are not a favorite of the law and the power to award them should be exercised with great caution (22 Am.Jur.2d, Damages, § 238). It is submitted that the trial court did not exercise such caution in the present case. That there may have been evidence of negligence or even of negligence that some persons would call gross does not preclude the court from disallowing the item in question. Although there may be some evidence supporting the trial court's finding, nevertheless if the reviewing court upon considering all of the evidence feels that a mistake has been made, the finding should be set aside as clearly erroneous (United States v. United States Gypsum Co., 333 U.S. 364, 68 Sup.Ct. 525, 42 L. Ed. 46 (1948)).

The cases indicate that excessive speed or intoxication or both may warrant punitive damages. In Smith v. McNulty, 293 F.2d 924, defendant had driven at "a very high rate of speed", crashed into the rear of plaintiff's car, fled the scene at 80 miles per hour and had been found to be drunk, surly and belligerent. In Morgan v. Bates, 390 P.2d 486, defendant after drinking for several hours drove, with plaintiff as a passenger, at speeds up to 90 miles per hour, lost control and rolled over. Punitive damages of \$1,000 were allowed. In Reid v. Strickland, 242 S.C. 466, 130 S.E.2d 416, defendant rounded a blind curve at 60-65 miles per hour in a 35 mile per hour zone and hit plaintiff's car. In Madison v. Wigal, 18 Ill. App.2d 564, 53 N.E.2d 90, defendant while under the influence of alcohol drove onto the wrong side of the highway at 50 miles per hour in a 35 mile per hour zone and collided with plaintiff.

In each of these cases there was an obvious element of conscious recklessness which is completely lacking in the present case.

The cases just cited should be compared with Baker v. Marcus, 201 Va. 905, 114 S.E.2d 617, where defendant after drinking enough vodka to have its odor on her breath when the police arrived, drove into the rear

of plaintiff's car. The police considered her intoxication "borderline" and, therefore, charged her only with reckless driving. In setting aside an award of punitive damages against defendant the court said:

"One who knowingly drives his automobile on the highway under the influence of intoxicants, in violation of a statute, is, of course, negligent. It is a wrong, reckless and unlawful thing to do; but it is not necessarily a malicious act. Evidence of intoxication [sic] may be offered to show the negligence of a driver; but in the absence of proof of one or more of the elements necessary to justify an award for punitive damages, it may not be used to enlarge an award of damages beyond that which will fairly compensate the plaintiff for the injury suffered.

* * *

"In the case before us, Mrs. Baker did not see the Marcus car and deliberately run into it. She had nothing personal against Marcus, nor the desire to do anyone harm. The evidence shows a typical rear end collision as a result of a lack of the use of ordinary care and caution. That Mrs. Baker did not keep a proper lookout is manifest, and her failure to do so constituted negligence. Her conduct may have been partly due to the intoxicants which she had imbibed; but there is nothing to show that she acted in a spirit of mischief, criminal indifference, or conscious disregard of the rights of others. Her conduct, after the collision, showed no motive to injure the plaintiff, or ill will toward him. She was then injured, and according to all the testimony she was dazed and hysterical. In momentarily taking her eyes off the road, she was

guilty of a misadventure, which amounted to simple negligence, and a mistake which is likely to cause an injurious result in automobile traffic at any time and place. The evidence presents no indicia of purposeful carelessness, deliberate inattention to known danger, or any intended violation or disregard of the rights of others on the highway. The accident which occurred could have happened to anyone under the circumstances mentioned, and the damages inflicted would have been the same whether or not the wrongdoer was sober or under the influence of intoxicants.

"For the reasons stated, we are of opinion that the trial court erred in submitting the question of punitive damages to the jury. Therefore, insofar as the judgment and verdict awarded punitive damages, the judgment is reversed and the verdict set aside, and the judgment, insofar as it awarded compensatory damages, is affirmed, and final judgment here entered accordingly. . . ." (pp. 621-22).

Obviously the mental attitude of the defendant in the present case was more closely akin to that of the defendant in Baker v. Marcus than to those of the defendants in the cases cited earlier.

From the evidence of the defendant's conduct in the record, there is insufficient evidence to support a finding that the defendant was guilty of such extreme "gross negligence" as to be deserving of a \$1,750 fine.

b. Even if some exemplary damages should have been allowed the amount of \$1,750 was grossly excessive.

One of the factors to be considered in determining the amount of exemplary damages is the punishment fixed by the criminal code for the act complained of (22 Am.Jur.2d, Damages, § 266).

Revised Laws of Hawaii, § 311-1 provides:

"Whoever operates any vehicle or rides any animal carelessly or heedlessly of the rights or safety of others, or in a manner so as to endanger or be likely to endanger any person or property, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

If the defendant was, in fact, in violation of the above statute, the monetary fine would at the very most be limited to \$1,000. However, when it is considered that the Hawaii statutes provide the same \$1,000 fine, as an alternative to imprisonment or as an addition thereto, for the crimes of intermediate assault, bribery, extortion, forgery, gross cheat, malicious injury, and driving under the influence of liquor, (see Revised Laws of Hawaii (1955) §§ 264-5, 265-2, 283-8, 285-9, 289-6, 296-1, 311-28) all of which involve intent and moral turpitude, it seems obvious that the fine in the present case should be substantially less than the \$1,000 maximum.

Neither intent nor moral turpitude was involved in the acts of the defendant in the instant case for which

he has been, in effect, fined \$1,750. Of course, the \$1,750 fine would be in addition to whatever other fine may have been imposed by the traffic courts arising out of the same incident. In sum, the defendant has been fined an amount which is far in excess of, and completely out of proportion to, the criminal penalties provided for his actions. This factor apparently was not considered by the court in its award of \$1,750 for punitive damages.

c. The trial court erred in denying defendant's motion to reopen the trial to introduce evidence of defendant's financial standing.

During the course of the hearing on defendant's motion to amend the findings of fact and conclusions of law defendant moved to be allowed to introduce evidence of defendant's financial standing. This motion was denied (R. 62).

The financial standing of defendant is a proper factor to be considered in a determination of the amount of exemplary damages:

"Although there are some contrary holdings, in most jurisdictions evidence of the financial condition of the defendant is admissible and may be considered by the jury in determining the amount of exemplary or punitive damages to be allowed

and what amount of punishment would be inflicted thereby on the theory that the allowance of a given sum would be a greater punishment to a man of small means than to one possessing larger wealth." (22 Am.Jur.2d, Damages, § 322, p. 422).

The facts included in the offer of proof made in connection with the motion to reopen the trial show that the allowance of \$1,750 exemplary damages against defendant would impose an unreasonable hardship upon him and that it would be a mistake to allow the trial court's finding in this respect to stand.

CONCLUSION

There is no evidence that plaintiff suffered any loss of his Navy base pay as a result of the accident and the so-called collateral source doctrine is not applicable because plaintiff was on duty and performing services during most of the period subsequent to the accident. Therefore, the court's findings of fact numbers 7a and b was not supported by any evidence and the amount of the judgement should be reduced by \$1,850.¹

The findings that plaintiff lost \$2,000 of civilian pay after leaving the Navy up to February 1966 and that he will lose an additional \$1,440 in the next three years could only have been based upon improper hearsay testimony as to the reason for plaintiff's rejection by Pacific Telephone Company and upon plaintiff's guess as to the rate of pay offered by the telephone company, and even if that testimony had been admissible,

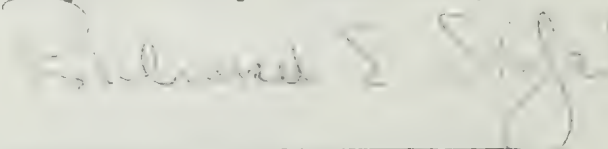
1. It is clear that the appellate court has the power to order judgment for a stated amount where the effect of an error by the trial court in assessing damages can be determined (6 Moore, Federal Practice ¶ 59.05[3], p. 3752).

it would not have supported the award. Therefore, finding of fact number 8 was clearly erroneous and the amount of the judgment should be further reduced by \$3,440.

The finding that plaintiff will with reasonable medical certainty suffer from arthritis of the left ankle as a result of the accident for which he is entitled to \$2,000 was not supported by the record and was clearly erroneous and the amount of the judgment should be further reduced by \$2,000.

The finding that defendant was so grossly negligent as to entitle plaintiff to \$1,750 in exemplary damages was clearly erroneous and the judgment should be further reduced by \$1,750 or, in the alternative, the case should be remanded for the reception of evidence as to defendant's financial standing and a redetermination of the amount of exemplary damages.

Respectfully submitted,



RICHARD E. STIFEL
Bank of Hawaii Building
Honolulu, Hawaii

Attorney for Defendant-
Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard E. Stifel

Of Counsel:

RICHARD E. STIFEL

ANDERSON, WRENN & JENKS
Bank of Hawaii Building
Honolulu, Hawaii

Attorney for Defendant-
Appellant

